

USDOL/OALJ Reporter

[*Williams v. Mason & Hanger Corp.*](#), ARB No. 98-030, ALJ No. 1997-ERA-14 (ARB Nov. 13, 2002)

U.S. Department of Labor

Administrative Review Board
200 Constitution Avenue, N.W.
Washington, D.C. 20210



ARB CASE NO. 98-030
ALJ CASE NOS. 97-ERA-14
97-ERA-18
97-ERA-19
97-ERA-20
97-ERA-21
97-ERA-22

DATE: November 13, 2002

In the Matter of:

JOHN R. WILLIAMS, JOE McQUAY,
NORMAN OLGUIN, GILBERT RODRIGUEZ,
TOM BYRD, STEVEN SOTTILE,
COMPLAINANTS,

v.

MASON & HANGER CORPORATION,
RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainants:

A. Alene Anderson, Esq., Tom Carpenter, Esq., Dana Gold, Esq., *Government Accountability Project, Seattle, Washington*, Robert C. Seldon, Esq., *Government Accountability Project, Washington, D.C.*

For the Respondent:

Rebecca A. Singer, Esq., Terry Goltz Greenberg, Esq., *Fulbright & Jaworski LLP, Dallas, Texas*

FINAL DECISION AND ORDER

This case arises under the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1994). The six complainants in this case, John R. Williams (Williams), Joe McQuay (McQuay), Norman Olguin (Olguin), Gilbert Rodriguez (Rodriguez), Tom Byrd (Byrd), and Steven Sottile (Sottile) (collectively referred to as "the Complainants") allege that the Respondent Mason & Hanger Corporation (the Respondent) subjected them to a hostile work environment (HWE) in retaliation for engaging in activities protected under the ERA. In addition, Williams, McQuay, Rodriguez and Sottile allege that the Respondent took the following actions against them, respectively, in violation of the ERA: Williams, temporary work reassignment and constructive discharge; McQuay and Rodriguez, temporary work reassignment; Sottile, temporary work reassignment and non-selection for promotion. During the relevant timeframe, the Complainants worked as Production Technicians on the disassembly of nuclear weapons at the Pantex Plant in Amarillo, Texas, which the Respondent operated pursuant to a contract with the United States Department of Energy (DOE). The plant employed a workforce of approximately 3000 at the time of the hearing, all involved in weapons programs.

[Page 2]

Williams filed two complaints, in July and December 1996. At Williams' request, the second complaint was incorporated into the first, which was then pending before the Administrative Law Judge (ALJ). Complaints were filed by McQuay, Olguin, Rodriguez, Byrd and Sottile in November 1996 and amended in December. Pursuant to the Respondent's unopposed motion, the ALJ consolidated for hearing the six complaints now before the Board. The ALJ held a formal hearing on June 23-30, 1997. On November 20, 1997, the ALJ issued a Recommended Decision and Order (RD&O) concluding that the six complaints should be dismissed. He specifically found that the Complainants had failed to establish that the workplace hostility they experienced was caused by activities protected by the ERA. RD&O at 60-61. He also found that the Respondent had taken prompt remedial action when put on notice of the Complainants' concerns about hostility in their workplace. *Id.* at 61-64. With regard to Williams' constructive discharge complaint, the ALJ concluded that Williams had not established that intolerable working conditions had forced him to resign. *Id.* at 64-66. The ALJ further determined that the retaliatory reassignment contentions advanced by Williams, McQuay, Rodriguez and Sottile lacked merit because they had failed to establish that the reassignments constituted adverse actions prohibited by the ERA. *Id.* at 66-67. Concerning Sottile's argument that the Respondent had violated the ERA by failing to select him for a higher salaried position as a supervisor, the ALJ determined that Sottile had failed to establish that the Respondent's decision not to select him was linked to retaliation for activities protected under the ERA. *Id.* at 68. In addition to challenging the ALJ's findings of fact and conclusions of law regarding the foregoing claims, the Complainants also contend that the ALJ erred in excluding evidence relevant to a pattern or practice of retaliation against whistleblowers at the Pantex Plant.¹

In response to the Complainants' hostile work environment arguments, the Respondent urges the Administrative Review Board (ARB or the Board) to adopt the ALJ's finding that protected activity did not play a role in the workplace hostility, as well as the ALJ's finding that the Respondent took prompt remedial actions when put on notice of the hostility. The Respondent also opposes the constructive discharge, temporary reassignment and non-promotion arguments advanced by the Complainants.

Based on a careful review of the record, the parties' arguments and the relevant law, we agree with the ALJ that all of the allegations advanced in the six complaints should be dismissed. As we explain, however, we cannot concur in various aspects of the ALJ's reasoning. Most significantly, the Board disagrees with the ALJ's analysis of the hostile work environment allegations. Specifically, we do not agree that the Complainants failed to establish an actionable level of hostility related to activity protected by the ERA. Although we concur with the ALJ's conclusion that the Respondent's liability for the hostile work environment has not been established, the Board reaches that conclusion on different grounds.

JURISDICTION AND STANDARD OF REVIEW

The Board has jurisdiction to review the ALJ's recommended decision pursuant to the automatic review provision that was in effect at the time the ALJ issued the recommended decision. *See* 29 C.F.R. §24.6(a) (1997); *see also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. §24.1(a)).² As the designee of the Secretary of Labor, the Board is not bound in this Part 24 case by either the ALJ's findings of fact or conclusions of law, but reviews both *de novo*. *See* 5 U.S.C. §557(b); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. (ARB Apr. 28, 2000) and authorities there cited.

[Page 3]

FACTUAL BACKGROUND

This case represents the first ERA complaint in which either the Secretary or the Board has been required to examine a work environment where the complainants are involved daily in the manipulation of nuclear weapons.³ These complaints arose while the Complainants were training for and working on a particular weapons program during an approximate thirteen-month period that began in October, 1995. A comprehensive description of the workplace where these six complaints arose and the hazardous work done there provides crucial background for the analysis of the issues in this case, particularly the issues relating to the hostile work environment claims.

The Complainants were all Production Technicians (PTs) on the W55 program, which involved the dismantling of nuclear weapons. The weapons were nuclear anti-submarine depth bombs, which had been produced in the 1960s. The bombs contained both high explosives and radioactive materials, which the PTs separated, with the attendant risks of

explosion and radiation exposure. Although the Pantex Plant was involved in more than forty weapons programs at the time of the hearing, the plant was engaged in only one weapon dismantlement program. Weapon dismantlement is more difficult than weapon assembly, particularly when – as was the case with the W55 – the weapons have reached an age at which the internal components may have deteriorated to a level that increases the attendant risks. Problems with dismantling these weapons had caused an earlier W55 program to be abandoned in the 1980s. Extreme care is required to minimize the public and workplace hazards posed by the work of separating the high explosive and radioactive components from a nuclear weapon. The meticulously detailed work procedures, the specially designed work area, the protective gear and equipment used, and the security measures employed all reflect the critical nature of this work.

The development of procedures for weapon dismantlement

In order to determine the safest, most efficient means of disassembly, a dismantlement program begins with preliminary plans developed by experts from the national nuclear laboratories who work with engineering staff from the plant. A carefully coordinated process follows, in which scientists, engineers and other plant experts work, initially on a dummy weapon, to develop detailed procedures for disassembly of the weapon. Because the W55 was being used to begin the plant's transition to a "seamless safety" approach to weapons programs, these experts also worked with a small team of PTs in developing the procedures. Previous programs had not involved PTs in the development of the procedures for dismantling the weapons. However, the W55 incorporated only some aspects of the seamless safety approach, which created considerable confusion among management and the W55 staff.

Development of the W55 dismantling procedures, known as Nuclear Explosives Operating Procedures (NEOPs), continued for more than a year. After a formal safety evaluation was conducted, the initial PT team proceeded to dismantle a number of weapons, called the "pilot lot." During that time, improvements to the process continued. Work on the pilot lot was completed approximately eighteen months after the initial PT team, known as the "A Group," began work on the W55 program. While the A Group was working on the pilot lot, a second team of PTs received training in the W55 NEOPs using a dummy weapon. Near the completion of the pilot lot by the A Group, the second team of PTs, the "B Group," was brought "on line," *i.e.*, to the W55 work area to join the A Group in dismantling weapons.

[Page 4]

The B Group included the six Complainants. Five of them – Williams, Sottile, McQuay, Olguin and Rodriguez – arrived on line on February 6, 1996, but Byrd was delayed until late March while awaiting his security clearance. Soon after the B Group began work on dismantling the W55 weapons, DOE gave approval for the program to proceed to full production. Until that point, the development of the W55 was under the direction of the Pantex Engineering and Design Division. When the program was ready to

proceed to full production, responsibility was shifted to the Manufacturing Division and its slate of supervisory personnel.

Further refinements to the dismantlement process

Although the NEOPs had been developed to a point at which full production could begin, it was expected that these exceptionally detailed instructions for dismantling the weapons would continue to improve as the PTs actually began to "work the process." The initial team, the A Group, had been randomly selected because they were PTs who were available to work on the W55; they had not been selected to participate in development of the W55 NEOPs based on any particular experience or qualifications. The plant manager and other supervisors testified that, although a "safe process" was set up before the mass dismantlement was begun, continuous improvements to the safety and efficiency of the operation were expected as new participants and observers, with differing levels of relevant experience, evaluated the dismantling procedures. Because of their hands-on role, W55 PTs were uniquely situated to suggest improvements to the arduous disassembly process. A central focus of this case is the conflict that arose when the B Group PTs, some of whom had extensive experience with nuclear weaponry and high explosives at Pantex or in the military, began to evaluate the risks posed by the W55 process. The B Group's concerns placed them in opposition to the A Group, who were largely wedded to the process they had helped to develop.

DOE guidelines and plant policy not only encouraged PTs to provide input regarding NEOPs development but also encouraged PTs to be alert to *ad hoc* safety concerns, which could arise at any time as a result of anomalies in the weapons, equipment malfunctions, or human omissions or mistakes. If, in the judgment of one or more PTs, a safety issue made it unnecessarily risky to proceed PTs could exercise their "stop-work authority" to halt disassembly on a unit. The PTs apparently took this authority very seriously and it was not exercised capriciously.⁴ Plant policy condemned forcing PTs to continue with an operation if they were uncomfortable.⁵ Nonetheless, the production schedule for the program was also a consideration in how safety issues were addressed.

NEOPs are developed to assure a safe disassembly process, and Mason & Hanger expected the process to be followed to the letter. To ensure that the detailed NEOPs were properly followed, a reader-worker procedure was required in which a third PT read the NEOPs steps to the other PTs who were actually manipulating the weapon. In addition, a Pantex engineer had to examine any structural anomaly discovered in dismantling a particular weapon so that the engineer could provide a written engineering instruction to the PTs regarding how to proceed on that unit. Certain NEOPs steps had to be executed by two PTs who both had their hands on the weapon at the same time.

The W55 work space and equipment

The W55 work was performed in a self-contained space that was generally referred to as the W55 bay. The bay actually comprised both a large work area, called the mechanical bay, and a smaller area, called the cell. The preliminary steps in the dismantling of each weapon took place in the mechanical bay, and the final steps of separating the radioactive elements in the physics package occurred in the cell. These two primary work spaces, along with adjacent smaller rooms, were fitted with fixtures to aid in the proper positioning of the weapon and its components during the various stages of disassembly. The high explosive in the weapon was very sensitive to force and could be detonated if dropped a matter of inches. Floor padding was used as a safeguard against such detonation during certain of the NEOPs steps. The work area was also equipped with several systems and features to enhance security and to limit the damage that could result from fire or explosion.

Several preliminary steps were required before the PTs entered the bay to begin work. They first gathered at the gate to the bay, where supervisory personnel held a "stand-up meeting." These daily stand-up meetings provided an opportunity for the supervisors to address any concerns raised by the PTs, to apprise the PTs of any developments regarding safety issues, and to announce each PT's assignment to either the preliminary mechanical work on the weapon or to the final work on the physics package in the cell. Before entering the bay, the PTs were required to test all the systems pursuant to a pre-operations checklist. As a safeguard, completion of some of the pre-ops checks required the participation of four employees. The PTs were also required to check a status board located at the gate in order to ensure that regularly scheduled maintenance on the critical systems serving the bay had been completed. Unlocking the bay required two PTs because the gate to the bay was secured by two locks, with no one person having access to the keys to both. One PT held keys to one of the locks, and the keys to the other lock had to be retrieved from a security station located some distance from the work area.

After the PTs entered the bay, they donned various items of protective gear, including face shields and lead aprons, depending on the task being performed. In addition to the fixtures installed in the work area, the PTs used a number of tools to dismantle the weapons, several of which were specially designed for the work. Occasionally there were delays in obtaining replacements for malfunctioning tools, and re-tooled equipment typically took weeks to design and obtain.

W55 supervisory and technical support staff

The PTs working on the W55 were subject to direction by an extensive organization of supervisory personnel and a wide range of Pantex technical experts. As previously noted, the Engineering and Design Division was responsible for development of the W55 until it proceeded to full production in March, when the Manufacturing Division took charge. While in training, the PTs were supervised by a trainer from the Training and Design Technologies Division.

In addition to these changes in the PTs' chain of command, the supervisory scheme was further complicated by the involvement of four lower level managers – a Program

Manager, an Operations Coordinator, and two Operations Managers who served as first-line supervisors. During the development of the disassembly process by the Engineering and Design Division, those supervisory positions were held by Mitch Carry as the Program Manager, Danny Brito as the Operations Coordinator, and Rustin Long and John Pontius, as the two Operations Managers. In addition, Kathleen Herring served as Director of Program Management during development of the W55 process. Herring's responsibility ended in late March, when the W55 program was transferred to the Manufacturing Division. At that time, Carry's responsibility also ended, when he was replaced by David Cole as Program Manager. Brito's supervisory responsibility as Operations Coordinator for the W55 continued, however, as did Pontius' responsibility as first-line supervisor. Long was reassigned to a different program and Paul Harter filled his slot as first-line supervisor.

[Page 6]

The first-line supervisors typically had individual responsibility for the two different work areas, the mechanical bay and the cell. Brito and Cole were frequently called when a problem arose on the W55 line. In addition, James Angelo, head of the Manufacturing Division, would occasionally meet directly with the W55 PTs, or all the PTs in the plant, to provide directions on important issues. The PTs also depended on assistance from personnel from other plant divisions, including the engineering, facilities management, radiation safety, high explosives, and nuclear explosives departments.

Open conflict on the W55 and management's response

The antagonism between the A Group PTs and the B Group, which included the Complainants, apparently began even before the B Group arrived on line. An investigative report and a follow-up root cause analysis, drafted respectively by Pantex managers John Meyer and John Rayford, were ordered by the Respondent in March and April 1996 as a means of examining various problems in W55 staff relationships. CX 2, 3. Those reports concluded that one problem was attributable to a communications and coordination failure by W55 managerial staff. That problem arose when the B Group requested changes to the W55 process while they were in training and then those changes were approved by management. When the A Group applied the new procedures in the W55 work bay, however, they were found to be problematic. Another problem reflected in those two reports and reinforced by management testimony concerned inadequacies in the training provided to the B Group for work on the W55. Management took steps to remedy both of these problems, particularly by changing the training provided to PTs who would later join the W55.

After the B Group arrived on line, they began to raise various concerns about the process itself, as well as questioning whether some of the A Group PTs and first-line supervisors failed to comply with safety guidelines. Over the course of the W55 program, management validated and acted upon many of the nuclear safety concerns the Complainants raised. In order to discuss various concerns that the Complainants had

raised in February, W55 management held safety meetings with program staff on February 27 – 29, 1996. At the last of those meetings, which plant manager William Weinreich attended, management scheduled a re-tooling session for the following day to attempt to minimize radioactive dust that posed an inhalation and ingestion risk or both, concerns which had been raised by the B Group. Afterwards, two of the A Group PTs, Randy Heuton and John Barton, spoke with Herring, the W55 program director, who took them to meet with Weinreich. They complained that they thought the W55 process did not need further improvements. The A Group PTs also expressed concern that a re-tooling shut-down would eliminate the overtime hours that they had been working. Barton testified that the B Group PTs were making notes about the W55 process, and he believed the B Group was trying to show that the A Group was "unsafe."

Within a few days, hostilities between the PTs culminated in a confrontation between Complainant Williams and Renee Stone, one of the A Group. The A Group PTs met with management and asked that Williams be removed from the program. Management decided to do so, but only on a temporary basis while an internal investigative team looked into the problem of hostilities on the W55. It was at this point that the Meyer investigative team interviewed W55 staff and prepared a report regarding the conflict between the two groups. After the internal investigation was completed, management directed Rayford to analyze the root cause of the antagonism between the A and B Groups and to recommend how it could be avoided in the future. The fact that management ordered these reports to be prepared reflects the close connection between personnel tensions and lessened productivity, as well as heightened safety concerns, on the W55 line. Under the guidelines relevant to operations with nuclear weaponry, one PT's emotional upset may require that operations be halted. Consequently, friction among employees could translate into serious operational problems from the standpoints of both safety and productivity.

[Page 7]

In April, management acted on this report. Specifically, management closed down W55 operations in order to schedule training in effective human interaction and teamwork for the entire program staff, followed by a line-by-line review of the NEOPs. Dozens of changes were made to the W55 process as a result of the NEOPs review. Williams had returned to the W55 and, after the NEOPs review, the hostility among co-workers was apparently less pronounced. Management also decided to separate the A and B Groups, with the A Group generally working in the cell and the B Group working in the mechanical bay. This helped to reduce the friction.

During the remainder of the time that the Complainants were on the W55 program, May to December 1996, the focus of workplace conflicts changed from incidents among the two PT groups to incidents between the B Group and lower level management. These exchanges usually involved disputes between the Complainants and the first- or second-level supervisor regarding compliance with nuclear safety guidelines. In July, Williams filed an ERA complaint with the Occupational Safety and Health Administration (OSHA)

and raised various concerns to higher management, including a contention that some W55 PTs viewed him as a troublemaker. In September, Mason & Hanger -- with Williams' concurrence -- engaged Vincent Noonan, an outside consultant, to conduct an investigation of several issues Williams had raised concerning his history on the W55. That report was released in late September.

Williams testified that hostility toward him increased during the Noonan investigation, and that it worsened in November after OSHA issued a decision in his favor on his ERA complaint. With the W55 program nearing completion, Olguin and Byrd were transferred into training for another program in early November. Williams quit work following a heated exchange with Harter in late November. In early December McQuay, Sottile and Rodriguez were assigned to work with the Facilities Division, on an interim basis.

ISSUES PRESENTED

1. Whether the Complainants established the existence of a hostile work environment during their tenure on the W55 program.
2. Whether the Complainants established that the Respondent is liable for the hostile work environment.
3. Whether Complainants Williams, McQuay, Sottile and Rodriguez sustained their retaliatory temporary reassignment claims; whether Williams sustained his constructive discharge claim; and whether Sottile sustained his non-promotion claim.

DISCUSSION

I. THE PATTERN AND PRACTICE EVIDENCE

As a threshold matter, we address the parties' arguments concerning the ALJ's exclusion of documentary evidence that purported to demonstrate that a work environment hostile to whistleblowers existed at Pantex prior to the 1995-96 timeframe covered by these complaints. The Complainants argue that the ALJ's determination to exclude documents that they offered to demonstrate a pattern and practice of unlawful retaliation against whistleblowers at the Pantex Plant interfered with what they characterize as their due process right to present this case fairly. CIB at 6, 52-54; CRB at 19-20. The Respondent urges that the Complainants have failed to demonstrate reversible error. RRB at 53-54.

[Page 8]

Formal rules of evidence do not govern this ERA case. In proceedings under the Act, "Formal rules of evidence shall not apply, but rules or principles designed to assure production of the most probative evidence available shall be applied. The administrative

law judge may exclude evidence which is immaterial, irrelevant, or unduly repetitious." 29 C.F.R. §24.6(e). In addition, an ALJ's action that does not substantially prejudice the presentation of a party's case does not violate the party's due process rights. Under 29 C.F.R. §18.103(a)(2), "A substantial right of the party is affected unless it is more probably true than not true that the error did not materially contribute to the decision or order of the judge." *See also Calderon-Ontiveros v. INS*, 809 F.2d 1050, 1052 (5th Cir. 1986) and cases there cited; *Smith v. Esicorp, Inc.*, No. 93-ERA-00016, slip op. at 11 (Sec'y Mar. 13, 1996).

Evidence of pre-existing hostility toward whistleblowers may be relevant to the cause of workplace hostility but may also, in certain circumstances, be relevant to the hostility level. *See Warren v. City of Carlsbad*, 58 F.3d 439, 443 (9th Cir. 1995). However, under the applicable authorities, the exclusion of evidence purporting to demonstrate a pre-existing work environment hostile to whistleblowers was within the discretion of the ALJ. In view of our conclusion, discussed *infra*, that each Complainant established that he was subjected to an actionable level of hostility related to ERA-protected activity, the exclusion of evidence of prior hostility would not affect the outcome of the HWE claims in this case.⁶ Additionally, because failing to admit documents that do not affect the outcome of the case is harmless error, if error at all, we agree with the Respondent and reject the Complainants' contention regarding the ALJ's exclusion of evidence of prior hostility toward whistleblowers.⁷

II. THE HOSTILE WORK ENVIRONMENT ALLEGATIONS

A. The standard for establishing a hostile work environment under the ERA

The employee protection provision of the ERA provides, in relevant part:

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions or privileges of employment because the employee (or person acting pursuant to a request of the employee) –

- (A) notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011 *et seq.*);
- (B) refused to engage in any practice made unlawful by this Act or the Atomic Energy Act of 1954, if the employee has identified the alleged illegality to the employer;
- (C) testified before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of this Act or the Atomic Energy Act of 1954;

[Page 9]

(D) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy

Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended;
(E) testified or is about to testify in any such proceeding or;
(F) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended.

42 U.S.C. §5851(a)(1) (1994). The ERA thus protects employees who raise nuclear safety-related concerns from retaliation in the form of discharge or other actions that rise to the level of discrimination with respect to the "terms, conditions or privileges of employment." This ERA protection has been construed to prohibit retaliatory harassment that creates a HWE. *English v. General Electric Co.*, 858 F.2d 957, 963-64 (4th Cir. 1988); *Smith v. Esicorp, Inc.* No. 93-ERA-00016, slip op. at 23 (Sec'y Mar. 13, 1996); *Marien v. Northeast Nuclear Energy Co.*, No. 93-ERA-00049, slip op. at 7 (Sec'y Sept. 18, 1995). The body of HWE case law developed under the ERA and its sister statutes draws heavily from court opinions applying Title VII of the Civil Rights Act of 1964. *See English*, 858 F.2d at 963-64; *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, slip op. at 16-17 (ARB Feb. 29, 2000) (arising under various environmental protection statutes); *Varnadore v. Oak Ridge Nat'l Lab.*, Case Nos. 92-CAA-2, -5; 93-CAA-1 (*Varnadore* 1996), slip op. at 90-101 (Sec'y Jan. 26 1996) (arising under various environmental protection statutes); *Smith*, slip op. at 23-27, (under ERA); *Marien*, slip op. at 7 (under ERA); 29 C.F.R. §24.1. The six Complainants allege that both supervisory and co-worker harassment contributed to workplace hostility.⁸ Before demonstrating that the Respondent is liable for such harassment, each of the Complainants must establish that prohibited harassment created a HWE, through proof, by a preponderance of the evidence, of the following elements:

- 1) that he engaged in protected activity;
- 2) that he suffered intentional harassment related to that activity;
- 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment;
- 4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

See Berkman, slip op. at 16-17, 21-22; *Freels v. Lockheed Martin Energy Systems*, ARB No. 95-110, ALJ Nos. 94-ERA-6, 95-CAA-2, slip op. at 13 (Sec'y Dec. 4, 1996) (quoting *West v. Philadelphia Elec. Co.*, 45 F.3d 744 (3d Cir. 1996)).

The ALJ's analysis of the HWE claims did not evaluate the allegations of each of the six Complainants on their individual merits. RD&O at 59-60. For example, in examining the issue of a causal link between protected activity and harassment, the ALJ did not distinguish between the differing approaches of the six individual Complainants to the raising of nuclear safety concerns, but focused only on the conduct of one complainant, Williams. *Id.*

The Complainants assert that the ALJ erred by faulting them for bypassing the W55 chain of command. RD&O at 60. Uncontradicted evidence in the record indicates that at least one of the Complainants never bypassed the chain of command. HT 1953-54 (McQuay). Furthermore, the record indicates that the extensive supervisory hierarchy along with the transitions between supervision by the Training, Engineering Design and Manufacturing divisions resulted in confusion about precisely who was in the Complainants' chain of command, particularly in the early months after they joined the W55 program. CX 2 at 3; HT 714-16, 725-26 (Meyer). The record also demonstrates that middle and higher level managers invited the PTs to bring concerns to them. HT 1484-85 (Carry), 1934 (Weinreich).

More importantly, it is a long-standing principle of whistleblower case law, established by the Secretary and further developed by this Board and the United States Courts of Appeals, that it is a prohibited practice for an employer to retaliate against an employee for not following the chain of command in raising protected safety issues. *See Pogue v. United States Dep't of Labor*, 940 F.2d 1287, 1290 (9th Cir. 1991); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 565-66 (8th Cir. 1980), *cert. denied*, 450 U.S. 1040 (1981); *Saporito v. Florida Power & Light Co.*, Nos. 89-ERA-7/17, slip op. at 5-7 (Sec'y Feb. 16, 1995); *Pillow v. Bechtel Const. Co.*, No. 87-ERA-35, slip op. at 22-23 (Sec'y July 19, 1993), *aff'd sub nom. Bechtel Const. Co. v. Sec'y of Labor*, 98 F.3d 1351 (11th Cir. 1996) (table). This chain of command principle is as applicable to communications with a regulating agency like the DOE as it is to the raising of nuclear safety concerns within the employer's organization. *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1511-13 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011 (1986); *Mackowiak v. Univ. Nuclear Systems*, 735 F.2d 1159 (9th Cir. 1984); *DeFord v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983).

The ALJ's HWE analysis also does not address the question of whether any of the Complainants had established the level of hostility necessary to prevail, *see* point 3) above. The ALJ does examine whether a causal connection between protected activity and the hostility had been demonstrated, *see* point 1) above. RD&O at 59-60. Concerning the level of hostility demonstrated by the Complainants, the ALJ states only, "That hostility was present in the W55 program is undisputed." *Id.* at 60.

Complainants urge that the ALJ erred by failing to identify evidentiary support for the vast majority of his factual findings, to acknowledge evidence that could support contrary

findings, or to provide an explanation for the rejection of such evidence. *See, e.g.,* CIB 7, CRB 1-3. The ERA requires that Secretarial decisions "be made on the record after notice and opportunity for public hearing." 42 U.S.C. §5851(b)(2)(A). Pursuant to the Administrative Procedure Act, decisions on the record must provide the "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law or discretion presented on the record" 5 U.S.C. §557(c)(3)(A) (1994); *see Lockert v. U.S. Dep't of Labor*, 867 F.2d 513, 517 (9th Cir. 1989) (holding that Secretary's ERA decision was adequate under §557(c)(3)(A), because the evidentiary basis for the decision was clearly specified and thus did not require speculation by the court); 29 C.F.R. §18.57(b) (summarizing contents required in ALJ decisions). Consistent with the mandate of Section 557(c)(3)(A), the ALJ's findings of fact must provide an explanation for the resolution of conflicts in the evidence and must reflect proper consideration of evidence that could support contrary findings. *See Nat'l Labor Relations Board v. Moore Bus. Forms*, 574 F.2d 835, 843 (5th Cir. 1978); *Office of Federal Contract Compliance Programs v. Goodyear Tire & Rubber Co.*, ARB No. 97-039, ALJ No. 94-OFC-11, slip op. at 16 n.13 (ARB Aug. 30, 1999) (citing *NLRB v. Cutting, Inc.*, 701 F.2d 659, 667 (7th Cir. 1983)); *Bartlik v. Tennessee Valley Auth.*, No. 88-ERA-15 (Sec'y Dec. 6, 1991) (remanding case to ALJ for specific credibility determinations and specific citations to the record).

Because the Board, as the designee of the Secretary, has plenary power in reviewing the ALJ's recommended decision in this case, *see* 5 U.S.C. §557(b); *Trimmer v. U.S. Dep't of Labor*, 174 F.3d 1098, 1102 n.6 (10th Cir. 1999) (under the ERA), we have engaged in a *de novo* review of the record and have rendered the factual findings necessary to decide these hostile work environment claims. The ALJ is in the best position to render demeanor-based credibility determinations because he has observed the witnesses at hearing. Accordingly, the ALJ's credibility determinations that "rest explicitly on an evaluation of the demeanor of the witnesses" are accorded significant weight. *Pogue*, 940 F.2d at 1289. Other than a determination regarding the credibility of Williams' testimony concerning the constructive discharge issue, RD&O at 65-66, the ALJ did not provide any credibility determinations. However, we have relied on various other indicia of witness reliability in reviewing the record. Witness self-interest, whether or not a witness' testimony is internally consistent, inherently improbable, or either corroborated or contradicted by other evidence, are all factors that we have applied to resolve any relevant conflicts in the testimony. *See Bartlik v. Tennessee Valley Auth.*, No. 88-ERA-15, slip op. at 5 n.2 (Sec'y Apr. 7, 1993) and cases there cited. We now discuss the legal standards for establishing an actionable level of hostility and other elements of the hostile work environment cause of action under the ERA.

B. Gauging the level of hostility under the ERA

We begin by examining the level of hostility that a complainant must establish to sustain a HWE complaint under the ERA. The Board and the Secretary have followed the lead of the Court of Appeals for the Fourth Circuit in *English* and adopted the Title VII requirement that in order to support a HWE allegation a complainant must establish harassment that is "sufficiently severe or pervasive as to alter the conditions of

employment and create an abusive or hostile work environment." *Varnadore* (1996), slip op. at 93-95 (noting that the *English* court relied on the *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) decision under Title VII in deciding an ERA complaint, and adopting the *Meritor* approach for environmental protection statutes); see *Berkman*, slip op. at 16 (quoting from *Smith*, slip op. at 23-24, which cites *Meritor*). In *Berkman*, the Board looked to the Supreme Court's Title VII decision in *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993) for guidance regarding the particular factors to be considered in

[Page 12]

evaluating the overall severity of the harassment. The Board noted that the Court in *Harris* directed that "all the circumstances" be considered in determining whether an actionable level of hostility has been established in Title VII cases. *Harris* identified the following as factors that may be relevant to this determination:

[T]he frequency of the discriminatory conduct, its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.

Berkman, slip op. at 16 (quoting *Harris*, 510 U.S. at 23). The Board in *Berkman* also recognized the fact that workplace interaction rarely conforms to an ideal level of harmony. In reality, workplace interaction involves missteps by both rank and file employees and managerial personnel, and our evaluation of the level of workplace harassment must provide leeway, a "normal range of workplace give and take," for such missteps on both sides. See *Berkman*, slip op. at 19. Actions or remarks that fall within the "normal range" of conduct in one workplace may be unacceptable in another. See *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82 (1998) (arising under Title VII). Just as the "social impact" of sexually harassing incidents alleged under Title VII is best evaluated by reference to "a constellation of surrounding circumstances, expectations, and relationships" in the workplace, *Oncale*, 523 U.S. at 81-82, the level of hostility created by the harassing incidents in this case are best gauged by reference to the characteristics of the workplace where they arose.

However, our determination regarding whether the harassing incidents here rise to an actionable level ultimately turns on the question of how best to serve the whistleblower protection purpose of the ERA. As the Complainants argue and the Board has observed, the purpose of the ERA differs from that of federal anti-discrimination legislation such as Title VII, in that the ERA whistleblower provision is intended to "promote the public health and safety enforcement goal" of the ERA. *Hobby v. Georgia Power Co.*, ARB Nos. 98-166, -169, ALJ No. 90-ERA-30, slip op. at 26 (ARB Feb. 9, 2001). As the Supreme Court stated in *English v. Whitfield*, 496 U.S. 72 (1990), the ERA's employee protection provision "encourages employees to report safety violations and provides a mechanism for protecting them against retaliation for doing so." 496 U.S. at 82.⁹ Title VII and other federal anti-discrimination case law provide guidelines for measuring the impact of harassment on a complainant's work environment, but the focal point of our

analysis must be whether such harassment undermines the raising of safety concerns protected by the ERA. *See Smith*, slip op. at 26 (holding that sarcastic, derogatory cartoons of whistleblower were "tantamount to intimidation, having a chilling effect on open communication between Ebasco [Esicorp] employees and the NRC, and counteract[ing] the purpose of the ERA"); *cf. Weller v. Citation Oil and Gas Corp.*, 84 F.3d 191, 194 (5th Cir. 1996) (emphasizing need to focus on Title VII goal in determining whether harassing acts rise to an actionable level); *DeAngelis v. El Paso Mun. Police Officers' Ass'n*, 51 F.3d 591, 593 (5th Cir. 1995) (same)(cited in *Smith*).

[Page 13]

Employees who work in nuclear power plants or weapons facilities play a crucial role in calling attention to hazardous conditions where risks to workers and public health and safety must be managed with considerable care. *See Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1569 (11th Cir. 1997); *Rose v. Sec'y of Labor*, 800 F.2d 563, 565 (6th Cir. 1986) (Edwards, J., concurring: discussing need for vigilance over nuclear operations and the role of ERA whistleblowers in promoting nuclear safety). This case demonstrates how, in addition to providing necessary input to regulators, employees involved in the handling of nuclear materials play a decisive role in alerting plant management to practices or conditions that would otherwise remain unchecked, possibly with dire consequences. DOE policy statements regarding enforcement of Nuclear Safety Requirements at facilities like the Pantex Plant emphasize the importance of identifying practices or conditions that do not comply with DOE Nuclear Safety Requirements and the role of employees in calling attention to such potential safety problems before serious consequences result. 10 C.F.R. Part 820, App. A (1995); *see* Final rule, procedural rules for DOE nuclear activities, 58 Fed. Reg. 43680, 43681, 43704-05 (1993); *see also* Interim rule, amendment of enforcement policy statement, 62 Fed. Reg. 52479, 52481, 52484 (1997) (codified at 10 C.F.R. Part 820 (2000))(regarding new provisions concerning the importance of "fostering a questioning attitude by [the contractor's] workers and supervisors").¹⁰ Congress amended the ERA in 1992 to explicitly cover complaints raised to an employer, in addition to complaints voiced publicly or to a regulatory agency. *See* §2902(a) of the Comprehensive National Energy Policy Act, Pub. L. No. 102-486, 106 Stat. 2776, 3123, Oct. 24, 1992 (codified at 42 U.S.C. §5851(a)(1)(A), (B) (1994)). By expressly extending coverage to internal complaints, Congress effectively ratified the decisions of several United States Courts of Appeals that agreed with the Secretary that the employee protection provision as originally enacted should be interpreted to protect informal complaints raised to an employer. *See Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 931-33 (11th Cir. 1995) and cases there cited (construing §210(a) of the Energy Reorganization Act of 1974, as amended, Pub. L. No. 95-601, §10, 92 Stat. 2949, 2951 (Nov. 6, 1978), codified at 42 U.S.C. §5851(a)(3) (1988)). As the court in *Bechtel Const.* explained, coverage of internal complaints "encourages safety concerns to be raised and resolved promptly at the lowest possible level . . . facilitating voluntary compliance with the ERA and avoiding the unnecessary expense and delay of formal investigations and litigation." 50 F.3d at 933. Stated differently, ERA protection is most effective when it encourages employees to aid their

employers in complying with nuclear safety guidelines by raising concerns initially within the workplace. Of particular significance to this case, Congress also amended the ERA in 1992 to extend coverage to the employees of contractors who operate DOE nuclear weapons facilities like the Pantex Plant.¹¹ *See* n.3, *supra*.

Thus, the question before us in these HWE claims is whether the harassing actions that are at issue reached a level, as analyzed under the *Harris* and *Berkman* guidelines – "sufficiently severe or pervasive as to alter the conditions of employment and create an abusive or hostile work environment" – that interfered with the raising of nuclear safety-related concerns in the course of W55 operations. Although we will consider the norms of conduct in the W55 workplace in our analysis, the determinative factor remains the impact of the harassment on the raising of safety concerns protected by the ERA.

C. The W55 work environment

The highly specialized work done by the Complainants, their co-workers, and supervisors required extraordinary attention to detail and involved a high degree of physical risk. Review of the extensive testimony and documentary evidence also suggests that the Complainants were working in a "rough-and-tumble" plant culture, where the PTs and their first-line supervisors were plain spoken and quite direct in speaking to one another, regardless of the topic. Not unexpectedly, these two elements a rough-and-tumble culture combined with the need for intense concentration and mutual cooperation in the hazardous work at hand contributed to an environment in which staff tension and frustration

[Page 14]

were vented through outbursts that occurred with some regularity. *See, e.g.*, HT 596-98, 601 (Stone, testifying re her use of foul language to express concern about loss of overtime at February 28, 1996 safety meeting); HT 866-69 (Olguin, testifying re exchange with a group PT James Moore, who had failed to properly survey a contaminated music stand); *see also* HT 1810 (Angelo, testifying re "body-slammings" incident involving W70 PTs that occurred in a breakroom); HT 477 (Williams, testifying that co-workers referred to the W55 Covey/team-building training as "love" or "Barney" classes, the latter in reference to a media character developed for pre-school children); RX 6 (Angelo memo re handling workplace friction, which anticipates isolated "stress relieving encounter[s]" among employees); RX 12, 68, 145 (*Pantexan*, plant newsletter). This impression is strongly reinforced by the numerous incidents in which PTs exchanged rather offensive remarks, and the lack of any indication in the record that these exchanges resulted in reprimands or other disciplinary actions. *See, e.g.*, HT 629-30 (Heuton, testifying that he called Williams various epithets because Williams' lack of trust in the A Group made him "mad"); *but see* HT 675-76, 1332, 1527 (testimony of Cole, Brito and A Group PT testifying re EEO counseling provided the PT because he allegedly made a racially disparaging remark). In sum, the record indicates that the

normal range of give and take in the W55 workplace provided leeway for intemperate remarks by both PTs and first-line supervisors.

With these aspects of the W55 workplace in mind, we examine the incidents of alleged harassment to determine whether they created a hostile or abusive work environment. In analyzing the incidents the Complainants allege, we consider whether the events were humiliating, threatening or merely offensive. We also address other factors adopted by the Board and the Secretary from *Harris* – how frequently the incidents occurred, to what extent the harassment pervaded the workplace and whether the harassment unreasonably interfered with the respective Complainant's work performance. *See Berkman*, slip op. at 16-17. As previously discussed, we consider all these factors in determining whether the harassment reached a level that impermissibly interfered with the raising of nuclear safety concerns. *See Smith*, slip op. at 26. Although the rough-and-tumble culture of the W55 workplace complicates our task, we must nonetheless determine whether such harassment created a work environment that was hostile to raising ERA-protected concerns.

D. The Complainants' protected activities

The ALJ determined that the Complainants' protected activities and the subsequent harassment were not related. We disagree. We find that a preponderance of the evidence establishes that the Complainants engaged in protected activities that gave rise to harassment from supervisory personnel and co-workers. Furthermore, we find and conclude that a preponderance of the evidence establishes that the resulting hostility was sufficiently severe and pervasive as to be actionable under the ERA, that the hostility would have detrimentally affected a reasonable person and did detrimentally affect each Complainant. *See Berkman*, slip op. at 16-17, 21-22. Before we analyze the level of harassment under *Berkman*, we discuss the legal standard for activities that qualify for ERA protection and the evidence relevant to such activities. Finally, we address the relationship between the protected activities and the incidents of harassment.

[Page 15]

1. The legal standard for determining which activities qualify for ERA protection

We note that the ALJ rendered only a summary finding regarding activity protected by the ERA. Specifically, the ALJ observed that the ERA amended in 1992 expressly covers complaints raised internally to an employer. He then concluded:

As to whether or not Complainants' concerns were about safety violations under the Act, I see no reason to spend time on this issue. Certainly, some concerns of the Complainants, whether voiced as a group or individually, were safety related and constitute protected behavior under the Act.

RD&O at 58. We agree with the ALJ that the record clearly supports a finding that the Complainants engaged in activities protected by the ERA. It is, however, essential that

we further identify those activities, in order to determine whether the complained of incidents of harassment were related to a protected activity and thus prohibited.

The ERA protects a number of activities that further the purposes of the statute. Those activities include communications with one's employer, or communications and cooperation with regulators or other government officials regarding nuclear safety requirements imposed under the Atomic Energy Act or the ERA. 42 U.S.C. §5851(a)(1)(A)-(F). Within the context of nuclear power plant operation and repair, the Secretary, the Board and a number of the United States Courts of Appeals have repeatedly addressed the issue of which activities qualify for ERA protection. That body of case law provides the following guidelines.

First, safety concerns may be expressed orally or in writing. *See, e.g., Stone & Webster Eng'g v. Herman*, 115 F.3d 1568, 1573 (11th Cir. 1997) (holding that when "an employee talks about safety to a plant fire official, an employer and an industry regulator, he or she acts squarely within the zone of conduct that Congress marked out under 42 U.S.C. §5851(a)(1)"), *aff'g Harrison v. Stone & Webster Eng'g*, No. 93-ERA-44 (Sec'y Aug. 22, 1995); *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995) (agreeing with Secretary's characterization of "questioning one's supervisor's instructions on safety procedures as 'tantamount to a complaint.'"), *aff'g Nichols v. Bechtel Const. Co.*, No. 87-ERA-0044 (Sec'y Oct. 26, 1992). Second, the concern expressed must be specific to the extent that it relates to a practice, condition, directive or occurrence. *See Sprague v. Amer. Nuclear Resources, Inc.*, 134 F.3d 1292, 1296 (6th Cir. 1998) (stating that covered ERA whistleblower "typically allege[s] a safety concern that [is] both concrete and continuing"); *Bechtel Const. Co.*, 50 F.3d at 931 (whistleblower "did not merely make general inquiries regarding safety but . . . raised particular, repeated concerns about safety procedures for handling contaminated tools"); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61, 63 (2d Cir. 1982) (whistleblower raised concerns about inadequate radiation work permit, possible production of radioactive dust by sandblasting, and lower level management's lack of action on safety complaints), *aff'g Cotter v. Consolidated Edison Co.*, No. 81-ERA-6 (Sec'y Nov. 25, 1981).

[Page 16]

Third, a whistleblower's objection to practices, policies, directives or occurrences is covered if the whistleblower reasonably believes that compliance with applicable nuclear safety standards is in question; it is not necessary for the whistleblower to cite a particular statutory or regulatory provision or to establish a violation of such standards. *See Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1507 (10th Cir. 1985) (quality assurance inspector's documentation of "potential construction deficiencies" and "potential quality assurance problems" constituted protected ERA activity), *aff'g Wells v. Kansas Gas & Elec. Co.*, No. 83-ERA-12 (Sec'y June 14, 1984); *Miller v. Tennessee Valley Auth.*, ARB No. 98-006, ALJ No. 97-ERA-2, slip op. at 5 (ARB Sept. 29, 1998) and cases there cited (unnecessary for employees whose work requires them to make recommendations regarding how best to serve the interest of nuclear safety to allege violation of specific

statutory or regulatory standard to qualify for ERA protection); *Seater v. Southern California Edison*, ARB No. 96-013, ALJ No. 95-ERA-13, slip op. at 5 (ARB Sept. 26, 1996) and authorities there cited; *Hobby v. Georgia Power Co.*, No. 90-ERA-30, slip op. at 17-18 (Sec'y Aug. 4, 1995) and authorities there cited, *aff'd sub nom. Georgia Power Co. v. U.S. Dep't of Labor*, No. 01-10916, slip op. at 12-15 (11th Cir. Sept. 30, 2002). This third principle is especially relevant to this case where, for the most part, the Complainants raised safety concerns while performing work with nuclear weapons that posed a risk of imminent danger to the workers and the public. Conditioning protection for such concerns on a reference to supporting legal authority or proof that a nuclear incident would otherwise occur would contravene the ERA interest of minimizing the risk of a nuclear accident.

Neither the Secretary nor the Board has previously addressed the question of ERA protection for specific concerns raised by employees who routinely work with the assembly or disassembly of nuclear weapons. The foregoing body of ERA case law developed from complaints arising within nuclear power plants, which are subject to Nuclear Regulatory Commission regulation.¹² In this case, however, we are dealing not with a nuclear power plant but with a nuclear weapons plant. In addition to the body of case law already discussed, we therefore also look to DOE regulations and orders regarding nuclear safety in determining what activities qualify for ERA protection.

2. The evidence and argument concerning protected activities

We find that the record establishes that each Complainant raised concerns about specific practices, conditions, directives or occurrences related to nuclear safety. We further find that, when the Complainants raised those concerns, each reasonably believed that compliance with applicable nuclear safety standards was in question. The Board thus concludes that each Complainant raised concerns that qualify for ERA protection. The Complainants' safety concerns can be arranged into several categories. We begin by explaining how those categories of concerns qualify for ERA protection pursuant to the guidelines just discussed. We also indicate the evidentiary basis for each finding.

a. Training

The Complainants' concerns regarding training for the W55 were raised with various supervisors in the latter part of 1995 and the early part of 1996. Those concerns touched on the inadequacy of the training space, the problem of being trained to use an improper tool for one of the NEOPs steps, a lack of briefing on the radiological risks attendant to working on the W55, inadequate training for cutting the weapons case on the W55, and the lack of adequate time for the trainees to absorb the training material. HT 62, 67-70, 78-80, 84-87, 104-07, (Sottile), 232 (Williams), 778 (McQuay), 904-05 (Olguin), 1108-15 (Byrd), 1223-25 (Herring), 1382-83 (Long), 1446-47 (Carry); *see* CX 2, 3, 4. Although the Respondent offered little evidence to contradict the Complainants' allegations and evidence about their safety concerns generally, the Respondent does contend that concerns raised while the Complainants were in training do not qualify for ERA protection. RRB 28-30. However, contrary to the Respondent's argument, the fact

that the Complainants advanced these concerns before they were on the W55 line and actually began handling radioactive materials and high explosives does not place them beyond ERA protection.

[Page 17]

The Respondent specifically relies on a passage from *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-0012, slip op. at 4 (ARB Apr. 8, 1997), in support of its argument that the Complainants' concerns raised during W55 training were only remotely related to nuclear safety and therefore not protected. The passage quoted by the Respondent concludes with the statement that "internal complaints about a technical issue which could only threaten the environment if many speculative events all occurred was not protected." *Kesterson*, slip op. at 4 (citing *Crosby v. Hughes Aircraft Co.*, No. 85-TSC-2, slip op. at 28-29 (Sec'y Aug. 17, 1993)). The Respondent's reliance on the *Crosby* holding that is referred to in *Kesterson* is wholly misplaced. The *Crosby* case arose under the Clean Air Act, 42 U.S.C. §7622 (CAA), the Toxic Substances Control Act, 15 U.S.C. §2622 (TSCA), and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. §9610 (CERCLA). *Crosby*, slip op. at 1. In *Crosby*, the Secretary concluded that the complainant's concern that a computer "bug" could occur in software that was yet to be developed, that the bug would not be discovered when the software was tested, that the software could be used in a program for the detection of a hazardous gas cloud, and that the detection system would therefore fail, was too tenuously connected to the purpose of the environmental statutes to be "grounded in conditions constituting reasonably perceived violations" of the environmental acts. *Crosby*, slip op. at 24-30. Obviously, the Complainants' concerns about whether they were being adequately prepared to actually separate the various components from a nuclear weapon were not so tenuously connected to nuclear safety as to preclude ERA protection.

Furthermore, the DOE mandates "Training and Qualifying of DOE and DOE Contractor Employees for Assignment to Nuclear Explosive Duties" under its Nuclear Explosive and Weapon Safety Program. US DOE O 5610.11, Ch. II (Oct. 10, 1990) (avail. at 1990 WL 656936 (D.O.E.)). We also find instructive the DOE commentary accompanying its promulgation of regulations to implement the Price-Anderson Amendments Act of 1988 (the P-AAA), which subjects DOE contractors to civil and criminal penalties for violations of DOE rules, regulations and orders relating to nuclear safety.¹³ 58 Fed. Reg. 43680 (1993) (Final rule, procedural rules for DOE nuclear activities, 10 CFR Pt. 820). In rejecting one commenter's suggestion that DOE narrowly construe "nuclear safety" within the context of its enforcement of the P-AAA, DOE stated:

A violation of an information or quality assurance requirement may not result in a direct or potential immediate threat to health or safety, but it could be an important link in a sequence of activities or events that could

lead to a nuclear incident or a radiological exposure. Thus, these requirements are properly DOE Nuclear Safety Requirements.

58 Fed. Reg. at 43681-82. Clearly, inadequate training prior to handling a nuclear weapon like the W55 nuclear depth bomb "could be an important link in a sequence of activities or events" that may compromise nuclear safety.

[Page 18]

Turning to the *Kesterson* decision cited by the Respondent, we initially note that it arose under various environmental statutes, including the CAA, the TSCA, the Solid Waste Disposal Act, 42 U.S.C. §6971, the CERCLA, in addition to the ERA. *Kesterson*, slip op. at 1; see 29 C.F.R. Part 24. *Kesterson* discusses activities that do not qualify for whistleblower protection and focuses largely on the standards established under the environmental protection statutes covered by 29 C.F.R. Part 24 and not on the standards established for nuclear safety under the ERA. *Kesterson*, slip op. at 4.¹⁴ Indeed, one of the principles of whistleblower protection under the environmental statutes that is cited in *Kesterson* is not relevant to this ERA complaint. That principle concerns the limited circumstances in which complaints about occupational exposure are protected under the environmental protection statutes, in contrast to the unqualified protection for concerns related to employees' radiation exposure under the ERA. For all the foregoing reasons, we reject the Respondent's reliance on the *Kesterson* decision.

The Secretary and the Board have explained in several cases that a concern relating only to an employee's workplace health and safety, and not to an adverse impact on the public or the environment, is not protected by the environmental protection statutes. See, e.g., *Tucker v. Morrison & Knudson*, ARB No. 96-043, ALJ No. 94-CER-1, slip op. at 4-5 (ARB Feb. 28, 1997) (arising under the Resource Conservation and Recovery Act, 42 U.S.C. § 6971 (RCRA), and the CERCLA); *Scerbo v. Consolidated Edison Co.*, No. 89-CAA-2, slip op. at 3-5 (Sec'y Nov. 13, 1992) (arising under the CAA); *Aurich v. Consolidated Edison Co.*, No. 86-CAA-2, slip op. at 3-4 (Sec'y Apr. 23, 1987) (arising under the CAA). Although an employee's concern about workplace exposure to a hazardous substance occasionally coincides with a risk of public or environmental harm, those cases are atypical. See *Jones v. EG&G Defense Materials, Inc.*, ARB No. 97-129, ALJ No. 95-CAA-3, slip op. at 10-14 (ARB Sept. 29, 1998) (arising under the TSCA, the CAA, and the RCRA).

In contrast, radiological protection for workers, as well as the public, is covered by the whistleblower provisions of the ERA. See 42 U.S.C. §2201; 64 Fed. Reg. 54543, 54544 (1999)(Final rule, 10 C.F.R. Part 20, Respiratory Protection and Controls to Restrict Internal Exposures, citing 1988 Memorandum of Understanding between NRC and the Occupational Safety and Health Administration published at 53 Fed. Reg. 43950 (1988)); cf. *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995) (agreeing with Secretary's conclusion that employee's questioning of supervisor regarding compliance with procedure for handling contaminated tools was protected under the ERA), *aff'g*

Nichols v. Bechtel Const. Co., No. 87-ERA-0044 (Sec'y Oct. 26, 1992). Accordingly, employee concerns about exposure to radioactive sources are covered by the ERA, regardless of whether exposure to the public at large is implicated *See* 29 U.S.C. §653(b)(1); *Stockdill v. Catalytic Industrial Maint. Co.*, No. 90-ERA-43, slip op. at 2-5 (Sec'y Jan. 24, 1996) and cases there cited.

Significantly, one of the training deficiencies the Complainants raised addresses the lack of a radiological briefing during their W55 training. The report produced for the Respondent by Noonan, the independent consultant who was chosen to investigate Williams' hostile work environment allegations in September 1996, documented this deficiency. CX 4 at 6. It is also significant that the Rayford root cause analysis of Meyer's March 1996 report found a link between conditions in the W55 training and increased "PT fears for their [sic] adequacy of training and their safety," which in turn contributed to the hostile work environment on the W55. CX 3 at M&H000102.

[Page 19]

We therefore conclude that the concerns the Complainants raised regarding deficiencies in the W55 training bear a substantial relationship to nuclear safety and thus qualify as protected activities under the ERA.

b. W55 dismantlement

Radiological exposure is also relevant to the next category of concerns the Complainants raised, which involves the W55 dismantlement process itself. Beginning while they were still in training and continuing until early March, the Complainants voiced the following concerns about the W55 process to various managers: whether the radioactive dust in the cell could be captured, and if not, whether the PTs could wear respirators during that step; whether the pressure exerted on the high explosive during rotation dangerously increased the risk of detonation; whether the pressurized stream of water used in one step was radioactively contaminated and whether the PTs should wear face shields to avoid a forceful stream of water to the face; whether some NEOPS in which the PTs worked within a specific proximity to exposed detonator cables should be designated for two-person coverage; and whether the bonding procedure adequately ensured that an electrical test on the weapon did not cause electrostatic damage to components inside the weapon. HT 96-110, 157-59, 206 (Sottile), 267-70 (Williams), 739-41, 1415, 1422-24 (Pontius), 753-57, 1460-63, 1472, 1475-76 (Carry), 780-87, 1782-85 (McQuay), 863-64 (Olguin), 1037-38, 1048-49, 1224-29, 1232-42, 1257-58 (Herring), 1117-19 (Byrd), 1405 (Long), 1495-98, 1545-46 (Cole), 1583-87, 1595 (McNabb); RX 13-20, 43, 45, 79.

Mason & Hanger opposes the Complainants' assertion that these activities are protected. It quotes from the Secretary's decision in *Abu-Hejli v. Potomac Elec. Power Co.*, No. 89-WPC-1 (Sec'y Sept. 24, 1993), that employees "have no protection . . . for refusing work simply because they believe that another method, technique, or procedure

or equipment would be better or more effective." RRB 28-29 (quoting *Abu-Hejli*, slip op. at 14, holding that the complainant was not protected by the work refusal standard established by *Pensyl v. Catalytic, Inc.*, No. 83-ERA-2 (Sec'y Jan. 13, 1984) when he refused to perform his assigned analytical tasks in an office setting). *Abu-Hejli* arose under the Water Pollution Control Act, 33 U.S.C. §1367, involved an analyst who refused to perform analytical work in an office setting, and is otherwise wholly inapposite to these ERA complaints arising in a nuclear weapons plant. *Abu-Hejli*, slip op. at 13-18). Furthermore, the "stop-work" procedure available to Pantex PTs is well-established in the record, and Weinreich, the plant manager, was said to be particularly concerned that PTs not be pressed to continue to work on a weapon when they were uncomfortable because of health or safety fears. HT 1592 (McNabb). We therefore reject the Respondent's reliance on *Abu-Hejli*.

We find that a preponderance of the evidence in this case establishes that the Complainants raised concerns about the W55 dismantlement process that are directly related to nuclear safety, and that those concerns were founded on a reasonable belief that compliance with applicable nuclear safety standards had been called into question by the actions of co-workers or supervisors. The evidence supports a finding that many of the Complainants' concerns about the dangers surrounding the W55 dismantlement process were clearly well-founded. HT 689-90 (Brito, acknowledging on cross-exam that significant improvements were made in April 1996 NEOPs review, which was prompted by Complainants' concerns); HT 584-86 (A Group PT Stone, testifying to improvements in removal of high explosive and in risk of radioactive dust inhalation/ingestion resulting from Complainants' efforts); HT 618 (A Group PT Teddy Dubose, also testifying regarding decreased risk of radioactive dust inhalation/ingestion); HT 1583-85, 1595 (McNabb, testifying about increasingly effective modifications to address dust problem, culminating in tooling suggested by one or more of the Complainants); *see also* RX 56 (Roby Enge's May 2, 1996 e-mail re W55 ingestion incident in early February, to which Complainants' concerns

[Page 20]

regarding dust bagging issue was related); RX 18-20 (minutes of February 27-29, 1996 safety meetings, at which radioactive dust issue was pursued primarily by Williams and McQuay); RX 62 (Angelo's memo regarding changes to the W55 in 1996). The Noonan report, in particular, indicates that changes to the W55 dismantlement process that the Complainants initiated resulted in substantial improvements in program safety. CX 4. ERA protection is not dependent on proof of an actual violation of nuclear safety standards. Nonetheless, the foregoing and other evidence leaves no doubt that the Complainants made significant contributions to nuclear safety on the W55. Furthermore, at least two of the issues the Complainants pursued – the two-person rule and the proper procedure for electrical testing of weapons – are significant enough to be specifically identified by the DOE 1990 Nuclear Explosive and Weapon Safety Program order. US DOE O 5610.11, *supra*, Chs. III and VII.

c. Departures from safety guidelines

The third category of activities that qualify for protection involves incidents where the Complainants believed co-workers or supervisors were departing from established safety guidelines. *See Bechtel Construction Co. v. Sec'y of Labor*, 50 F.3d 926, 931 (11th Cir. 1995); *Consolidated Edison Co. v. Donovan*, 673 F.2d 61, 63 (2d Cir. 1982).

We conclude that the following responsive actions the Complainants took are protected by the ERA: questioning supervisory direction to deviate from NEOPs without a written Engineering Instruction; questioning the lack of documentation regarding electrical testing for some weapons; questioning the refusal of other W55 PTs to wear face shields during the use of pressurized water on weapon components; questioning supervisors' use of – or directing PTs to use – malfunctioning tools, which had been tagged "do not use"; questioning why high explosive flakes on the W55 work area floor were not routinely cleaned; questioning another PT's carrying of high explosives across an unpadded floor; questioning why there was no documentation to ensure that a weapon with cracked high explosive had been x-rayed; objecting to an inaccurate photograph of the fire deluge system gauges that was incorporated into the pre-operations checklist; objecting to the number of weapons being stored in the work area as inconsistent with ALARA principles;¹⁵ objecting to another PT's failure to properly survey equipment for radiation contamination before removing it from the restricted area. *See* HT 130-32, 140-42, 167-69, 1973-74 (Sottile), 253-54, 260, 273-74, 333-38 (Williams), 551 (William Ross, DOE Representative), 785-86, 799-816, 1954-58 (McQuay), 860-63, 866-69, 872-76, 930-32, 950-51 (Olguin), 958-59, 966-67, 973-75, 979-80 (Rodriguez), 1127-30, 1134-35, 1178-82, 1193-96 (Byrd), 1331, 1333 (Moore), 1493-95, 1514-15 (Harter), 1557-60 (Cole). Some of these concerns relate directly to prevention of an accidental explosives detonation and are obviously linked to nuclear safety. *See* US DOE O 5610.11, *supra*, Ch. IV 3d., Gen. Nuc. Explosive Safety Rules. Other concerns address compliance with proper procedures for controlling radiation exposure. *See Bechtel Const. Co.*, 50 F.3d at 931; *Consolidated Edison*, 673 F.2d at 63. Still others address the integrity of what Angelo described as the "safety envelope" in which the hazardous work on the W55 took place. CX 69 (Angelo's December 6, 1996 memo); *cf. Diaz-Robainas v. Florida Power & Light Co.*, No. 93-ERA-10, slip op. at 11-12 (Sec'y Jan. 19, 1996) (complainant's pursuit of repair and implementation, respectively, of two alarm systems that monitored critical nuclear plant conditions were protected by the ERA).

[Page 21]

d. Internal complaints about harassment

Complaints to managerial personnel regarding hostility toward the Complainants for their protected activities comprise the fourth category of activities that qualify for ERA protection. As we describe in the individual summaries that follow, the Complainants reported incidents of harassing behavior by A Group PTs, other co-workers or first-line supervisors that they believed resulted from anti-whistleblower sentiment. As previously

discussed, the ERA as amended expressly protects internal complaints. 42 U.S.C. §5851(a)(1)(A) (protecting employee against discrimination because he had "notified his employer of an alleged violation of this Act or the Atomic Energy Act of 1954 (42 U.S.C. 2011, *et seq.*)"); *see summary supra* §§IIB, D1. This coverage extends to internal complaints of retaliation. *Cf. Diaz-Robainas v. Florida Power & Light Co.*, slip op. at 10-11 (Sec'y Jan. 19, 1996) (construing pre-1992 amendments ERA as covering internal complaints of retaliation). As the Secretary discussed in *Diaz-Robainas*, an internal complaint of retaliation is subject to the "reasonable belief" requirement that applies to all internal complaints. *Diaz-Robainas*, slip op. at 10-11. Particularly in view of our conclusion that the hostility in the W55 workplace was linked to the Complainants' protected activities, we have no difficulty finding that the Complainants reasonably believed that the harassing incidents that they reported represented conduct prohibited by the ERA. *See* 29 C.F.R. §24.2(b), (c). We therefore conclude that the Complainants' reporting of such incidents qualifies for ERA protection.

e. External complaints

External complaints comprise the final group of activities that qualifies for ERA protection. Complaints to government agencies, whether written or oral, are covered by the statute. 42 U.S.C. §5851(a)(1)(D), (F) (prohibiting discrimination against an employee who has "commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this Act or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this Act or the Atomic Energy Act of 1954, as amended" or who "assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other manner in such a proceeding or in any other action to carry out the purposes of this Act or the Atomic Energy Act of 1954, as amended."). Sottile and Williams voiced concerns to DOE representatives, and all six Complainants filed formal complaints under the ERA with the OSHA regional office, which handles the preliminary investigation of whistleblower complaints. ALJX 1-6; HT 115-19, 133-37, 210 (Sottile), 312-13 (Williams), 553-58, 567-69 (Ross), 1918-21, 1938, 1939 (Weinreich); *see* 29 C.F.R. §§24.3–24.5. We therefore conclude that these external complaints qualify for ERA protection.

3. The relationship between the protected activities and the incidents of harassment

a. The ALJ's reasoning

According to the ALJ, the Complainants' safety concerns did not provoke the A Group's hostility. Rather, the ALJ found that the A Group's "sense of ownership" of the W55 disassembly process, combined with the way the Complainants conducted themselves after arriving on line, and the "attitude" of Williams, especially, were the causes of the hostility between the two groups. RD&O at 60-61. We do not concur in these findings.

We disagree with the ALJ's reliance on the A Group's "sense of ownership." To conclude that such personal, subjective sentiments justify harassment of employees who are attempting to reduce radiation exposure or the risk of a nuclear accident would be antithetical to the purpose of ERA whistleblower protection. We also note that the record establishes that Pantex Plant guidelines contemplated that the W55 dismantlement process that the A Group had helped to develop would be refined further, as various PTs Aworked the process." HT 678-79 (Brito), 1074-75 (Weinreich), 1218-19 (Herring), 1458-59 (Carry), 1411-13 (Long). Those guidelines reflect the importance of efforts to improve nuclear safety and are at odds with the "sense of ownership" justification.

Likewise, we cannot concur in the ALJ's determination that the Complainants had engaged in inappropriate conduct, including improperly bypassing the chain of command. That finding is not supported by the record and, if it were, it would not provide a proper basis, in and of itself, on which to fault the Complainants and deprive them of ERA protection. *See* discussion *supra* §IIA.

In addition to finding that the Complainants had contributed to hostility on the W55 program by failing to properly follow the chain of command, the ALJ also found that the Complainants' "attitudes" provoked hostility among others working on the W55. RD&O at 60-61. The ALJ specifically found, "From the moment of their arrival, the Complainants, most particularly Williams, made threats of lawsuits and shut downs, ignored advice from the experienced A team members" RD&O at 60. In faulting the Complainants for such conduct, the ALJ failed to apply the proper legal standard. Statutorily protected conduct which is, nevertheless, "indefensible under the circumstances," may remove the statutory protection. *Martin v. Dep't of the Army*, No. 93-SDW-1, slip op. at 5 (Sec'y July 13, 1995); *see also Mobil Exploration and Producing U.S. v. Nat'l Labor Relations Board*, 200 F.3d 230, 242-43 (5th Cir. 1999) (addressing need to balance employee's right to engage in protected activity against employer's right to maintain order and respect); *Carter v. Elec. Dist. No. 2 of Pinal Co.*, No. 92-TSC-11, slip op. at 19-21 (Sec'y July 26, 1995) (same, but as applied in Part 24 whistleblower cases by Secretary). Therefore we will review the record and analyze the chain of command and *Martin* conduct issues under the appropriate standards. We turn now to that analysis.

b. Establishing a causal nexus between protected activity and harassment

To properly evaluate whether the hostility was related to protected activity, the Board must first examine the various incidents of harassment to determine whether they are linked to protected activity, or whether some acts of harassment were motivated by other factors, including conduct on the part of one or more of the Complainants that was wholly unrelated to protected activity. *See Berkman*, slip op. at 17-21; *Acord v. Alyeska Pipeline Serv. Co.*, ARB No. 97-011, ALJ No. 95-TSC-4, slip op. at 2-6 (ARB June 30, 1997). If the harassment was linked to protected activity, we then examine the incident to determine whether one or more of the Complainants engaged in misconduct that was indefensible in those circumstances, and thus forfeited their protection under the ERA. *See Martin*, slip op. at 5. The *Martin* standard also applies to a complainant's conduct in

circumstances in which he or she has been provoked by the actions of others that violate the ERA. *See Dunham v. Brock*, 794 F.2d 1037, 1041 (5th Cir. 1986); *Carter*, slip op. at 19-21. Of course, only the Complainants' protected activities that were known to their supervisors and co-workers could have contributed to retaliatory harassment. *See Berkman*, slip op. at 16-17, 21-22.

[Page 23]

The March incident in which a PT from the W70, another weapons program, threatened to "take care of" Williams if his whistleblowing resulted in a shut-down of the W70 program is, of course, an obvious example of harassment directly related to protected activity. HT 326-29 (Williams); *see* CX 4 at 20. The record also indicates instances of hostility arising as an immediate reaction to the raising of safety issues. That hostility was manifested in varying degrees, particularly during the February 6 - March 6 period. *See* CX 4 at 8. Both W55 managers and A Group PTs resisted the Complainants' safety concerns. Some A Group PTs made hostile comments during meetings in which the Complainants' concerns were being discussed. HT 596-98 (Stone), 788-89, 832-33 (McQuay), 1126-27 (Byrd); RX 19. Managerial resistance, although subtle, is also evident in the pressure brought to bear on the Complainants at the February safety meetings. HT 917-20 (Olguin), 1350-51 (Dolores De los Santos, union safety officer); CX 106; RX 19, 20; *see* discussions *infra* §§II E1-3. We must agree with the Complainants' contention that Herring, the W55 program manager who had primary responsibility for development of the W55 process, demonstrated resistance to changes to the W55 process when she took A Group PTs Heuton and Barton to plant manager Weinreich to express their view that the W55 process did not need improvement. HT 1054-59, 1258-60 (Herring). In contrast, the A Group PT whose ingestion of radioactive dust, spurred Williams and other Complainants on in their efforts to have the W55 equipment re-tooled to better contain the dust supported the Complainants' efforts at the safety meetings. RX 19, 20.

The A Group's hostility culminated when they met with Herring on March 6 to complain about Williams and to request that he be reassigned. *See* HT 579-81 (Stone), 633 (Heuton), 1291-93 (Barton); RX 27. The evidence establishes that Herring and the A Group were interested in squelching Williams' concerns about the W55 process. A Group PTs testified that they were hostile because the Complainants raised safety issues about the W55 disassembly process. For instance, A Group PT Heuton testified that the A Group was already "mad" at the Complainants before they arrived on the W55 line in February because of the changes in the W55 process that the Complainants had initiated while in training. HT 626-28 (Heuton). A Group PT Stone testified that she resented the Complainants making suggestions for improvements. HT 584-86 (Stone). Stone had also objected to the loss of over-time hours that resulted from the March 1 shut-down for re-tooling. RX 20; HT 596-98, 601 (Stone). The Meyer report contained similar findings linking the A Group's hostility to safety issues. CX 2 at 2-3, 4, 5; CX 3; *see also* CX 4 at 8 (Noonan's report). Pontius testified that he was surprised that the Stone/Williams confrontation of March 4 had been raised to higher management. HT 736-39 (Pontius).

Regardless of whether higher management shared the interest of the A Group PTs and Herring in squelching Williams' safety concerns, it reassigned Williams to the W70 and took no action against Stone. HT 1862-65 (Weinreich); CX 2, 4.

Higher management's intent is difficult to discern here. The Respondent's contention that the reassignment action was consistent with plant policy is refuted by evidence demonstrating that it did not have a standard practice or a stated policy for transferring PTs from programs when serious interpersonal conflicts arose. HT 940-43, 951-53 (Olguin), 1749 (Noonan); CX 4 at 18, 26-29; RX 66. However, Weinreich immediately appointed an investigatory team to evaluate hostility among W55 employees and he returned Williams to the W55 after the investigatory report was provided in late March. HT 310-13 (Williams), 1094, 1868-69 (Weinreich); RX 42; CX4. These actions suggest that Weinreich was attempting to defuse a tense situation in a workplace where employee confrontations could have dire consequences. The preponderance of the evidence nonetheless does establish that the hostility of the A Group and Herring toward Williams for raising safety concerns provided the impetus that led to Weinreich's reassignment decision. *See Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980), *cert denied*, 450 U.S. 1040 (1981) (ERA case in which court noted, "The presence or absence of retaliatory motive is a legal conclusion and is provable by circumstantial evidence even if there is testimony to the contrary by witnesses who perceived lack of such improper motive."); *see also Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 141 (2000) (quoting *U.S. Postal Service Bd. of Governors v. Aikens*, 460 U.S. 711, 716 (1983), regarding the "sensitive and difficult" question posed by employment discrimination cases, in

[Page 24]

which "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes."). Following Williams' reassignment, the A Group PTs made intimidating remarks to other Complainants to express their satisfaction regarding the reassignment, and the evidence supports the inference that these remarks were intended to further discourage the raising of safety concerns in the W55 work environment.¹⁶ HT 798-99 (McQuay), 859-60 (Olguin).

Other situations arose during the remaining months of the W55 program where the Complainants' safety concerns provoked hostile reactions from supervisors or co-workers. Among the most notable are the incidents in which the lower level supervisors and Operations Coordinator Brito, or both, directed the PTs to deviate from the NEOPs requirement that a written Engineering Instruction be obtained when an anomaly in the construction or condition of components was found in a particular weapon. HT 140-42 (Sottile), 332-37 (Williams), 546-48, 551, 565 (Ross), 803-08, 1957-58 (McQuay), 966-67, 973-74, 979-80 (Rodriguez), 1495-98, 1513-15 (Harter), 1560-61 (Cole), 1589-93 (McNabb). We have considered the various accounts of Harter, Pontius, Brito, and the Complainants regarding these incidents. Despite differences in the details concerning whether the supervisors reacted angrily or not, the witnesses, including McNabb and

Ross, agree that the supervisors pressed the PTs to proceed without a written Engineering Instruction. *See id.* In addition, Pontius, Harter, Brito and Cole testified that Harter and Pontius, as first-line supervisors, were angry because both the Complainants and higher management were bypassing them in the chain of command. HT 670-71 (Brito), 744-46, 1429-30, 1432-35 (Pontius), 1508-10, 1517-18 (Harter), 1559-60, 1570-72 (Cole). Although these supervisors testified that Harter and Pontius were annoyed because they wanted the Complainants to come to them initially in order to provide those supervisors an opportunity to address the safety issues in the first instance, the record as a whole indicates that Harter and Pontius were actually annoyed because the Complainants were pursuing safety concerns, regardless of what avenue they used. This finding is supported by the evidence of incidents where Pontius and Harter responded angrily when the Complainants, or other W55 PTs, raised safety issues directly to them. *See, e.g.*, HT 806-08 (McQuay), 864-65 (Olguin), 966-67, 973-74, 979-80 (Rodriguez); §IIE summaries, *infra*; *cf. Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d 926, 929-31, 935 (11th Cir. 1995) (affirming Secretary's finding in favor of ERA whistleblower; noting that whistleblower had raised issue of proper procedures to second-level supervisor, that co-workers testified that first-line supervisor directed them to violate established procedures, and that first-line supervisor was angry because whistleblower had gone to second-level supervisor). This evidence further supports the Complainants' testimony concerning supervisory hostility to their safety concerns. *See Ellis Fischel State Cancer Hosp.*, 629 F.2d at 566.

Furthermore, comments by W55 supervisory personnel Jackie Peak and Brito, and Facilities Management supervisor Dennis Doty during the February-March 1996 period indicate antagonism toward the Complainants. CX 4 at 26-27; RX 118, 119; *see* HT 1783-88, 1831 (Angelo), 1351-53 (De los Santos); CX 106 at 000292.¹⁷ As noted by the Respondent, Brito's and Doty's remarks were apparently not known to the Complainants during the course of the W55. RRB at 21 n.21, 35 n.26. The record is not so clear regarding the remarks by Peak. *See* CX 4 at 26-27. Remarks of which the Complainants were not aware could not contribute to the *level* of hostility they experienced. *Cf. Torres v. Pisano*, 116 F.3d 625, 633 (2d Cir. 1997) (complainant could rely on hostile remarks that she knew her boss made about her as evidence of hostile work environment). Nonetheless, evidence of these

[Page 25]

remarks is relevant and supports a conclusion that W55 supervisors Peak and Brito harbored hostility toward the Complainants for raising safety issues.

The evidence also establishes that the A Group PTs continued to harbor anti-whistleblower animus over the course of the W55. *See, e.g.*, HT 167-69, 1971 (Sottile). We infer that, even in those few situations where the hostile remarks or actions of co-workers did not refer to whistleblower activities and did not occur as an immediate response to such activities, the harassment was linked to the Complainants' raising safety issues. *See, e.g.*, HT 138-40, 177-79 (Sottile, testifying re Barton's harassing remark about hitting someone, with impunity); *cf. Carter v. Chrysler Corp.*, 173 F.3d 693, 693,

701 (8th Cir. 1999) and cases there cited ("All instances of harassment need not be stamped with signs of overt discrimination to be relevant under Title VII if they are part of a course of conduct which is tied to evidence of discriminatory animus.").

We now consider the Complainants' conduct under the *Dunham* and *Martin* standards. The record contains evidence that, on more than one occasion while pursuing a safety concern, Williams conducted himself in a questionable manner. We must examine that evidence to determine whether such conduct was "indefensible under the circumstances," thus depriving Williams of ERA protection. *See Dunham*, 794 F.2d at 1041; *Martin*, slip op. at 5. Ample, largely uncontradicted evidence supports findings that Williams: told co-workers and at least one managerial staffer "you don't know what you're talking about"; repeatedly referred to consultations with an attorney and orally threatened to file suit against co-workers; unnecessarily assumed authority beyond that of a PT in interacting with his co-workers; and threatened to shut-down the W55 operation when less drastic measures were available. HT 150-51 (Sottile), 1291-93 (Barton), 1419-20, 1430-31 (Pontius), 1608-10 (Tim Pederson, health physicist), 1466-68, 1473-77, 1486-88 (Carry); RX 27, 29; CX 4 at 27; CX 28.¹⁸ We note that most of these incidents occurred in February, soon after Williams came to the W55 dismantling operation. Nevertheless, we do not conclude that his actions and remarks were indefensible. We are mindful of the inadequacies in Williams' W55 training, which are especially significant because Williams, unlike the other Complainants, had worked only a few years at Pantex and had no experience working with nuclear weapons or other radioactive materials. *See* CX 3; CX 4 at 7; HT 220-22, 224, 363 (Williams), 1776-78 (Angelo). Considering the workplace culture, the lack of a constructive working relationship with the A Group PTs, and the extremely hazardous nature of the work activity, we do not find it altogether surprising that a relatively inexperienced PT like Williams behaved intemperately in his first few weeks of work on the W55.

The other Complainants generally took a more diplomatic approach to raising and pursuing their ERA concerns. For example, McQuay had known Peak, the trainer, for a number of years at Pantex, and he expressed his concerns privately to Peak about the need to slow down the W55 instruction, rather than voicing them in front of the other PTs in class. HT 778 (McQuay). The record does indicate rare instances in which the other Complainants became agitated in discussing W55 safety issues, but none of these occasions rise to a level of misconduct under the *Dunham* and *Martin* standards. *See* HT 96-107, 1971 (Sottile), 753-55, 1449-52 (Carry), 866-69, 932 (Olguin), 1328-32 (Moore). We also conclude that note-taking by the Complainants was not disruptive or indefensible. Other PTs stated that the note-taking made them uncomfortable, that it gave them a feeling of being under heightened scrutiny in performing their jobs. They testified that they felt like they were "being audited," that "there was going to be a court case," and that "everybody was writing down everything," which worried them. HT 1292, 1297 (Barton), 1319-20 (B Group PT Anne Jackovich), 1363-64 (A Group PT F. Rodriguez). This testimony, however, does not suggest that the Complainants were acting in a manner intended to disrupt the workplace. *Cf. Talbert v. Wash. Public Power Supply Sys.*, ARB No. 96-023, ALJ No. 93-ERA-35, slip op. at 8-9 (ARB Sept. 27, 1996) (holding that complainant's comment in meeting was not objectively disruptive although supervisor

characterized it as such). In fact, Program Manager Cole testified that the Complainants used breaks from work in which to make these notes. HT 1572-73 (Cole). The record does not indicate that the Complainants neglected or interrupted their W55 work to make these records.

[Page 26]

We find that a preponderance of the relevant evidence establishes that W55 supervisors harbored retaliatory animus toward the Complainants for raising concerns protected by the ERA. We also find that the A Group PTs were antagonistic toward the Complainants when they voiced safety concerns regarding the W55 dismantlement process. The Board further finds that, while engaged in protected activity, the Complainants did not conduct themselves in a manner that would result in a loss of protection under the *Martin* standard. Finally, we find that the record contains evidence of only minor and insignificant incidents in which Williams or the other Complainants provoked hostility while not engaged in protected activity.¹⁹ We therefore conclude that the Complainants suffered harassment that was related to activities protected by the ERA. To provide a basis for evaluating the level of hostility, we examine the specific incidents of harassment in the following summaries.

E. Summaries of harassing incidents experienced by each Complainant

As we detail in the individual summaries of the HWE incidents that follow, the Complainants engaged in differing levels of activity protected by the ERA. The Complainants who independently raised more safety concerns, or who initially raised more concerns and were then joined by other Complainants in pursuing those concerns, were more often the direct target of disparaging remarks or actions by co-workers or supervisory personnel. The Complainants shared close working relationships on the W55, with all the Complainants having the same supervisors and co-workers, even if sometimes on different shifts and work days. *See, e.g.*, HT 1970-71 (Sottile). It is thus appropriate for us to follow the Federal courts' approach under Title VII and other anti-discrimination statutes, and take into account incidents of both direct and second-hand harassment that were experienced by each Complainant. In this ERA case, second-hand harassment includes comments or actions that are directed at another whistleblower but are witnessed by or recounted to a Complainant. *See Gleason v. Mesirow Financial, Inc.*, 118 F.3d 1134, 1144-45 (7th Cir. 1997) (arising under Title VII); *Schwapp v. Town of Avon*, 118 F.3d 106, 111-12 (2d Cir. 1997) (Title VII) and cases there cited.²⁰

We have examined the evidence *de novo* and rendered the findings of fact necessary to resolve the issues before us in this appeal. In the following summaries, we identify the relevant evidence, discuss material conflicts in that evidence, and explain our resolution of such conflicts.

1. Complainant Williams

Williams played a leading role in raising concerns about the W55 program, especially during the first month after February 6 when the B Group arrived on the W55 line.²¹ The record clearly establishes several incidents in which lower and middle-level supervisors and A Group PTs resisted Williams' safety concerns. *See, e.g.*, CX 2, 3, 4; HT 595-96 (Stone), 1596-98 (McNabb); HT 243-46 (Williams, regarding A Group PTs' general disagreement with his concern about the dust bagging issue). Williams and other Complainants testified that, although the W55 program was still in its developmental phase, supervisors and A Group PTs repeatedly discouraged them from suggesting safety-related improvements to the disassembly process while they were in training and during their first few weeks on the W55 line. HT 100-02, 164-67, 212-13 (Sottile), 231-32, 243-46 (Williams), 1123 (Byrd). Williams and other Complainants also said that supervisors frequently deflected suggestions for safety-related

[Page 27]

improvements by saying that the W55 disassembly procedure was a "safe and repeatable" process. HT 60, 111-12, 144 (Sottile), 788, 790-91 (McQuay), 231-32, 267-68 (Williams); *see* RX 14 at M&H002881 (Carry's memo regarding February 22, 1996 safety meeting).²²

In February, middle and lower level W55 supervisors were hostile to Williams at meetings held to discuss safety-related issues he was pursuing. On February 20, Herring, Carry, and Long met with Williams. *See* CX 24. Williams testified that Herring, then Director of Program Management for the W55, was reluctant to entertain his concerns at that meeting, that she insisted that there were no safety "problems" with the disassembly process and that only safety "enhancements" were needed. HT 248-49, 284-85 (Williams). The testimony of Long, the Complainants' immediate supervisor at that time, supports Williams' account. He testified that Herring's frequent reference to the W55 disassembly procedure as a "safe and repeatable process" suggested to the Complainants that Herring was not amenable to changes in the process. HT 1394-1400, 1407 (Long).²³ Like the A Group, Herring had been involved in the development of the W55 process, and the support that she subsequently demonstrated for the A Group PTs suggests that she shared their "sense of ownership" in the disassembly process as it stood on February 20. *See* HT 1054-59, 1258-61 (Herring). As already discussed, Herring played a primary role in the decision to act on the A Group's complaints about Williams by temporarily reassigning him to the W70 program in early March. *See* discussion *supra* §IID3.

The record also indicates that Carry, the Manufacturing Division Program Manager, relied on the "safe and repeatable process" concept to downplay significant safety-related concerns, like the radioactive dust bagging issue that was discussed at the February 28 W55 safety meeting. The minutes of that meeting indicate that when PT Moore asked, "[B]ut how long have we been asking for something to be done?" Carry responded that "the process is safe and has been reviewed and . . . we need to enhance it." RX 19 at 11. Moore's question indicates that W55 supervisors were reluctant to implement safety improvements to the process and had been for some time prior to the February 28

meeting. We thus credit Williams' testimony, and we find that he met with significant resistance when he expressed concerns in the February 20 meeting with Herring, Carry and Long.

After Williams sent Angelo a copy of a follow-up letter that he had written to Herring, all the W55 PTs and many of the supervisors met on February 27–29 to discuss program safety. RX 16, 18, 19, 20, 43; *see* CX 24; RX 22; HT 1059-60 (Herring), 1753-55 (Angelo). Record evidence, including meeting minutes prepared by management, corroborates Williams' testimony that A Group PTs who opposed the safety improvements made disparaging remarks at those meetings. CX 7, 106; RX 16, 18, 19, 20; HT 110-13, 174-75 (Sottile), 289-90 (Williams), 601-02 (Stone), 793, 832-33 (McQuay), 1126-27, 1173-77 (Byrd), 1420-22 (Pontius), 1459 (Carry). The Complainants testified that supervisory remarks at those meetings suggested that Williams and others who were pressing safety-related concerns about the W55 process were being put "on trial," particularly in the February 28 and 29 meetings. Other evidence supports the Complainants' inference. CX 7, 106; RX 19, 20; HT 289-90, 443-44 (Williams), 787-91, 793, 831-33, 837 (McQuay), 857-58, 915-21 (Olguin), 1283-85 (Herring), 1347-51 (De los Santos); *but see* RX 20 at 11 (meeting minutes: Weinreich's remarks supporting a shut-down for re-tooling to address radioactive dust problem); HT 1076-77 (Weinreich, testifying that he attended the meeting as an observer, joined the meeting while in progress and made his comments regarding the re-tooling at the close of the meeting), 1460-63 (Carry, testifying regarding Weinreich's re-tooling directive).

[Page 28]

We agree with the Respondent that management took corrective action to address most of the concerns regarding the W55 disassembly process as it stood in February. RX 14-20, 43, 45-47, 62, 79; HT 205-06 (Sottile), 904-05 (Olguin), 1342-45 (De los Santos), 1532-38 (Cole), 1773-78 (Angelo); *see* RRB 21-27. The record also demonstrates, however, that lower and middle-level managers usually undertook such corrections begrudgingly. Furthermore, W55 supervisory staff and the A Group PTs continued to manifest resentment towards the Complainants. *See* HT 169-73, 176 (Sottile), 625, 628-29 (Heuton), 763-65, 1524-25, 1571-72 (Cole), 860-61, 864-65 (Olguin), 960-63, 1992-93 (G. Rodriguez), 1213, 1253-54 (Herring), 1363-64, 1368-70 (F. Rodriguez); *see also* RX 16 at 4 (minutes of February 27 meeting, PT Moore stating that "ideas go to the foreman and engineer and nothing gets done"). In addition, corrective action like the W55 NEOPs review and rewrite in April addressed the W55 disassembly process as written in February, but did not address the Complainants' concerns regarding the failure of some A Group PTs and W55 supervisory staff to comply with established safety guidelines. *See* RX 14-20, 45, 62. Those additional concerns continued to be a source of conflict for the Complainants. *See, e.g.,* November 24 and 26 incidents discussed *infra*. Based on the foregoing evidence, we find that Williams was subjected to antagonistic and intimidating remarks by W55 supervisors and A Group PTs who sought to discourage him from raising safety-related concerns.

We also find that a W70 PT threatened Williams while he was working on the W70 program during his March reassignment, *see* n.16 *supra*. Williams testified that this W70 PT threatened to "take care of" him "without a trace" if Williams' whistleblowing caused a plant shutdown that resulted in the loss of the PT's job. HT 326-29 (Williams); *see* CX 4 at 20. Williams' testimony is uncontradicted, and the testimony of Curtis Broaddus, the Pantex Operations Security and Counterintelligence Officer, provides corroboration. Broaddus confirmed that the same W70 PT had initiated a security investigation of Williams a few months later. HT 1623-28 (Broaddus). We also credit as true Williams' general allegation that Rob Protsman, a Pantex training specialist, confronted him off-site, in March and again in June, for criticizing the Pantex training department. HT 324-26 (Williams). Williams' claim that the training specialist confronted him – at a cocktail lounge in a hotel near the plant – is supported by Noonan's investigation and findings. CX 4 at 20, 24. In addition, Weinreich testified that he followed up on Williams' complaint about these confrontations by directing that the training specialist be counseled regarding proper professional conduct. HT 1883-84 (Weinreich).

We similarly credit Williams' allegation that he received a hostile reception from A Group PTs when he initially returned to the W55 work area sometime after March 26, when the Meyer team's internal investigation report was completed. McQuay's testimony and Angelo's memorandum regarding his meeting with W55 PTs to discuss Williams' return support Williams' uncontradicted testimony. HT 310-13 (Williams), 799-800 (McQuay); RX 42. Williams returned to the W55 in April after management agreed that his return could be delayed to coincide with the teamwork training and table-top review of the W55 NEOPs. HT 310-13, 321 (Williams), 1779-80 (Angelo).

[Page 29]

Williams testified that fewer incidents of harassment occurred over the next several months. In June, the W70 PT who had threatened Williams in March initiated an investigation of Williams by the Pantex Operations Security and Counterintelligence Officer. That investigation automatically triggered a DOE and Federal Bureau of Investigation inquiry, which was dropped following a preliminary examination. HT 326-29 (Williams), 1623-28 (Broaddus); CX 4 at 25; CX 5. In early July, Williams met with plant manager Weinreich and other higher level managers twice to discuss his concerns regarding W55 operations and whistleblower protections at the plant. RX 71. In late July, Williams filed his first ERA complaint with the OSHA regional office, in which he alleged a HWE.²⁴ ALJX 1. In early September, Noonan was engaged and began to investigate various issues Williams had raised. HT 1694-95 (Noonan); *see* CX 4. Although Williams testified that Noonan's investigation had rekindled hostilities toward him, he did not identify any specific incidents of harassment occurring from September through most of November. *See* HT 2000-04 (Williams).

Williams left Pantex on November 27 after several events occurred. On November 21, the OSHA regional office issued a decision finding in favor of Williams on the HWE complaint that he had filed under the ERA in July. ALJX 1. According to Williams'

undisputed testimony, higher management ordered Pantex security to provide Williams with constant protection while he was at the plant after OSHA issued its decision. HT 2004-09 (Williams). At hearing, Williams cited this management action as evidence of the high level of hostility plant personnel harbored against him because of his whistleblower activities. HT 2004-05 (Williams).

On November 26 supervisors Harter and Brito became angry when Williams joined McQuay and others in pursuing a safety issue involving a crushed or pinched detonator cable. HT 332-37 (Williams). Although minor conflicts exist among the versions of this incident, McQuay, Williams, and Rodriguez testified that Harter initially declined to insist that an engineer come to the W55 work area to inspect the detonator cable. HT 332-37 (Williams), 806-08 (McQuay), 966-67, 973-74, 979-80 (Rodriguez). Furthermore, Harter does not dispute the Complainants' testimony and it is corroborated by DOE representative Ross, who was contacted at the time. HT 546-48, 551, 565 (Ross), 1513-15 (Harter). Brito joined Harter, and they insisted that the PTs continue with the disassembly process with only telephone approval from an engineer and thus without the safeguard that an engineer's inspection of the detonator cable would provide. HT 332-37 (Williams), 806-08 (McQuay), 966-67, 973-74, 979-80 (Rodriguez), 1560-61 (Cole), 1589-93 (McNabb). Brito and Harter relented when McQuay persisted and stated that he would exercise his stop work authority until an engineer arrived. HT 806-08 (McQuay); *see* HT 980 (Rodriguez), 1495-98, 1515 (Harter), 1957-58 (McQuay). We find that the November 26 incident did occur as the Complainants attested.

Uncontradicted evidence also establishes that on the following day DOE representative Ross stopped Williams, who was accompanied by Sottile, while Williams was on his way to pick up the W55 work area keys. HT 180-81 (Sottile), 549-52 (Ross), 336-38, 497-98 (Williams). Following a brief exchange with Ross, primarily about the detonator cable incident of the day before, Williams and Sottile picked up the keys and returned to the W55, where Harter was waiting for them. HT 336-38, 497-98 (Williams). Both Sottile and Williams testified that Harter became extremely angry when he discovered that they had been delayed by Ross. HT 133-35, 181-83 (Sottile), 337-42, 497-98 (Williams). Angelo acknowledged that Harter had demonstrated anger regarding the brief delay and had been disciplined, not because he had spoken in an inappropriate tone toward Williams, but because he had demonstrated anger toward a DOE representative in the presence of Williams and other PTs. HT 1024-26, 1788-89 (Angelo). Williams left the plant following the heated exchange with Harter. HT 181-83 (Sottile), 497-501 (Williams), 1505-10, 1517-18 (Harter). Based on the foregoing evidence, we find that on November 27 Harter harassed Williams for engaging in the protected activity of responding to the DOE representative's questions. On December 2, Williams filed a constructive discharge complaint under the ERA. ALJX 1.

2. Complainant McQuay

McQuay also took a leading role in raising and pursuing safety issues. *See, e.g.*, HT 1596-98 (McNabb, Program Engineering Manager, testifying that Williams, Sottile and McQuay raised more issues than other PTs). In the first month after the B Group reported to the W55 line, McQuay actively sought both to improve the process for removing high explosive components from the weapons and to decrease the risk of ingestion or inhalation of radioactive dust. HT 740-41, 1415 (Pontius), 780-85 (McQuay), 1475 (Carry). The evidence demonstrates that, like Williams, McQuay was the target of supervisors' hostile remarks and A Group jeers and snide remarks in the W55 safety meetings held in February. Most significant are McQuay's comments made at the February 28 meeting, at which he exercised his stop work authority based on his concern about the radioactive dust issue. McQuay stated that supervisors were putting him and others "on trial" for pursuing W55 improvements. RX 19 at 11-13; *see* HT 780-91, 793 (McQuay). Specifically, McQuay stated, "We feel intimidated. We are on trial here, that's what we're here for. In the reactions we get from certain people in our areas, we feel the friction, but we want to make it clear we are here to work and we want to do the work." RX 19 at 13. The testimony of union safety officer De los Santos, along with notes she made immediately following the meeting, support McQuay's view. De los Santos testified on cross-examination that Carry repeatedly stated that it was important to use stop work authority when appropriate, but his other remarks and overall conduct of the February 28 meeting made the PTs feel "extremely uncomfortable and pressured" not to exercise their stop work authority. HT 1350-51 (De los Santos); *see* CX 106. De los Santos testified that she then intervened and called for a work stoppage to implement improvements that would address the PTs' concern about ingestion or inhalation of radioactive dust. HT 1350-51 (De los Santos); *see* RX 19 at 11-12. The February 28 meeting minutes also indicate that Gary Britten, a radiation safety manager, made antagonistic remarks regarding whether the re-tooling efforts being pursued by McQuay and others were worthwhile. Specifically, Britten stated that the only way to address the PTs' concern about the radioactive dust was to use respirators. RX 19 at 17. Britten's remarks prompted McQuay to ask, "Is that a threat?" and De los Santos to comment, "It sounds like a threat to me." *Id.* Near the end of the meeting, McQuay requested two tool "enhancements." After explaining the hazards posed by the tooling then in use, McQuay stated that he had "asked back in November for this to be addressed." Before Carry could reply, Herring interjected, "It's not relevant, when or where." *Id.* at 19. We find that the foregoing evidence establishes that W55 supervisors intimidated McQuay when he voiced safety concerns in February.

Also, at one of the February meetings at which McQuay was present, A Group PT Stone used obscene language to express her disappointment that the overtime hours the PTs had been working would not be available while re-tooling efforts were underway. HT 596-98 (Stone), 788-89, 793, 832-33 (McQuay), 1126-27 (Byrd); *see* RX 19 at 18-19; *see also* RX 20 at 5 (February 29 meeting minutes, quoting one PT's statement, "Some people are worried about the overtime, but I'm worried about my health."). McQuay testified that A Group PTs also made gloating remarks after Williams' March 6 reassignment to the W70 program, and suggested that he could be the next target of reassignment. HT 797-800, 839-40 (McQuay). That testimony is uncontradicted and is also supported by Olguin's testimony regarding similar A Group remarks. HT 859-60

(Olguin). Based on the foregoing evidence, we find that McQuay was subjected to antagonistic and intimidating remarks by A Group PTs because of the safety concerns that he raised.

[Page 31]

With regard to the W55 program as a whole, McQuay testified that it was "a constant battle" to advance safety concerns beyond the first- and second-level supervisors and "to someone who would listen." HT 1959 (McQuay). For example, McQuay was concerned that the number of weapons and cases in the W55 area at one time should be limited because of the increased radiation exposure. HT 811-12, 1954-57 (McQuay); *see* HT 1178-82 (Byrd, discussing proximity to weapons and disassembled cases while in the work area), 1793-96 (Angelo, discussing ALARA concerns related to number of units in the work area);²⁵ *but see* HT 1601-03 (Pederson, health physicist, testifying that additional weapons in work area did not "significantly increase" radiation exposure). McQuay testified that he repeatedly met resistance from supervisor Harter when he raised issues such as this. HT 811-12, 1954-57, 1963-64 (McQuay). Other Complainants also testified regarding similar conflicts over this issue with Harter, as well as Pontius. HT 872-76 (Olguin), 1127-30 (Byrd). Higher management addressed this ALARA issue because lower and middle level managers had failed to do so. A memorandum prepared by Clyde VanArsdall, senior manufacturing division manager, who met with Williams during Angelo's absence in early July, indicates that higher management directed the Waste Operations division to promptly remove disassembled cases from the work area and directed W55 supervisors to alert the Waste Operations division as soon as two cases had accumulated. RX 71 at M&H000215-216; *see also* HT 1546-51 (Cole, testifying regarding the PTs' concerns about the number of weapons "staged" in the bay, *prior* to disassembly).²⁶ We find that McQuay continued to experience resistance from lower and middle level managers regarding compliance with established safety guidelines over the course of the W55 program.

On November 18, McQuay filed his ERA complaint with the OSHA Regional Office, alleging that a hostile work environment existed on the W55. ALJX 2. On November 26, McQuay was involved in the detonator cable incident that we discussed in the Williams summary, *supra*. McQuay asserted his stop-work authority on November 26 before Harter and Brito called an engineer to come inspect the detonator cable. McQuay testified that he was also the target of similar hostility on November 24, when Harter became "extremely agitated" because McQuay insisted on compliance with the NEOPs directive that an engineer come to the line to examine a structural anomaly and to provide an engineering instruction before weapon disassembly continued. HT 803-05 (McQuay). We find McQuay's uncontradicted testimony regarding the November 24 incident to be true.

McQuay also was involved in "a very unpleasant confrontation" with Brito and Facilities Management supervisor Hoops when McQuay raised a safety-related issue in December. The incident arose on a day when he was the PT responsible for certifying the accuracy of the W55 pre-operations checklist, and it occurred soon after Angelo had met

with the PTs and emphatically instructed them to sign such checklists only if they were absolutely accurate. HT 812-16 (McQuay). Harter was absent so McQuay contacted Brito and advised him that an inaccuracy in the W55 pre-operations checklist prevented him from certifying its accuracy. *Id.* Brito came to the W55 with Hoops and both became extremely angry when McQuay pointed out that the checklist contained an inaccurate photograph of the fire deluge system gauges. HT 814-15 (McQuay). McQuay explained to Brito that Angelo had met with the PTs and put them on notice that anyone who certified inaccurate checklists would be subject to discipline. HT 814-15 (McQuay). In addition, McQuay told Brito and Hoops that he wanted to comply with Angelo's directive but did not want to prevent work from commencing in the W55 bay. *Id.* To that end, McQuay testified, he suggested that Hoops arrange for a new photograph to be taken and that Brito go ahead and override McQuay's objection to the checklist. *Id.*

[Page 32]

Brito did not testify regarding this incident, and Hoops was not called as a witness. The testimony of both Cole and Angelo provides support for McQuay's version of events, however. Although Cole acknowledged that it was necessary to replace the photograph of the fire deluge system gauges for the checklist to be accurate, he nonetheless testified that he believed that McQuay and the other PTs were just trying to come up with things . . . to harass the supervisors" HT 1557-60 (Cole). Angelo did not address Cole's viewpoint or Brito's conduct, but he did attest to the significance that he attached to completion of an accurate pre-ops checklist. Specifically, Angelo testified that he had met with over four hundred Pantex PTs to impress upon them that some were "not paying close enough attention to pre-operational form requirements" and he cited the DOE shutdown of the Rocky Flats plant as an example of what could happen if safety violations caused DOE "to lose confidence in our ability to operate the plant." HT 1804-07 (Angelo). Angelo had emphasized the importance of these checklists a few months before but, at this meeting with the PTs, he also required them to sign "a statement of understanding of responsibilities" related to the checklists in order to reinforce his directive. HT 1804-05 (Angelo); *see also* CX 69 (Angelo's December 6, 1996 memo to managerial staff reminding them that "the qualification of people [is] no less important to the Process Safety Envelope than preop checks are to the Facility Safety Envelope," and alerting them that he will recommend termination for a negligent failure either to check workers' qualifications or to properly conduct pre-ops checks).

Rodriguez testified that he supported McQuay in his concern about the pre-ops checklist because he had attended the meeting with Angelo and signed the statement of understanding. HT 972-73 (Rodriguez). Byrd, who attended the meeting with Angelo but who had already left the W55 when the pre-ops checklist incident occurred, testified regarding the emphatic tone Angelo used in that meeting and the strong impression made by his reference to a plant shutdown. HT 1143-45, 1184-86 (Byrd). Providing further support for McQuay's account of the incident is Rodriguez' testimony that Brito and Hoops became very agitated over the pre-ops checklist issue. HT 960-63 (Rodriguez). Brito angrily berated McQuay when he followed Angelo's directions regarding the

"safety envelope" in which the W55 work was done. Later that day McQuay was assigned to custodial work under the direction of the Facilities Management Division, prior to his assignment to the W69 program.²⁷ McQuay amended his ERA complaint on December 17 to include further allegations. ALJX 2.

3. Complainant Sottile

Sottile, like McQuay and Williams, played a prominent role in raising concerns about the W55 process, particularly during the November 1995 - January 1996 training period and the first month after the B Group's February 6 arrival on the W55 disassembly line. *See, e.g.*, HT 1596-98 (McNabb, Program Engineering Manager, testifying that Williams, Sottile and McQuay raised more issues than other PTs). We have already found that Herring was hostile to suggestions that the W55 NEOPs needed improvement, and that this mindset was evident in the conduct of the W55 safety meetings held in February. Sottile testified that he met resistance to his concerns about training and the disassembly process. HT 61-64, 79-80, 84-85, 96-107, 111-12, 144, 160, 163-67, 212-13, 1971 (Sottile). One of the more significant incidents involved Sottile's request that the PTs be allowed to wear face shields to avoid being sprayed by a stream of pressurized water that was being used to separate weapon components. The face shields were ultimately approved for addition to the PTs' protective equipment, but Sottile testified that Carry and other supervisory staff did not heed his and Williams' concern when it was initially raised. HT 96-107, 1971 (Sottile). According to Sottile the supervisory staff was more interested in rebuking the PTs for

[Page 33]

their concern than in assisting them with protection against the water spray, which -- even if uncontaminated -- could disorient a PT who was handling high explosives. HT 96-107 (Sottile). The record provides support for Sottile's testimony on this point.

The documentary evidence is at odds with the supervisors' testimony about how long it took for the face shields to be made available to the W55 PTs. In an attempt to refute Sottile's account, Herring, Carry and Pontius testified that the face shields were implemented as protective equipment almost immediately. Specifically, Pontius testified that Williams and Sottile raised the issue to him after Williams had been sprayed, and that face shields were implemented "within a day or two" after their request. HT 739-40, 1422-24 (Pontius). Herring testified that, after Williams raised the issue to the supervisors in the February 20 meeting, they began the process of obtaining approval for the additional protective equipment from the Nuclear Explosives Safety Department. HT 1236-40 (Herring). Carry testified that he first knew about the face shields issue when Williams raised it, along with the related issue of whether the water was contaminated by radiation or chemicals, in the February 20 meeting with Herring, Carry and Long. HT 753-54 (Carry). Carry also testified that Sottile reiterated the request in a later meeting, at which time Sottile was told that "the engineering staff had already been directed to incorporate those face shields" HT 754-55 (Carry); *see* HT 1449-52 (Carry).

However, other parts of Carry's testimony and his February 22 memorandum, RX 14, contradict these statements.

Rather than supporting the testimony of Pontius, Carry and Herring that the face shields were "immediately implemented" as protective equipment, the relevant evidence supports Sottile's testimony that the supervisory staff seemed to be more concerned with thwarting the use of the face shields than in facilitating their use. At a meeting with the W55 PTs on February 22, Carry told them that the use of face shields would be discussed at a meeting to be held the following week. RX 14 at M&H002883. In a February 22 memorandum to Williams, Carry advised that the engineers that been "directed to include face shields" in the water pumping operation, but the minutes of the safety meetings held on February 27 and 28 indicate that use of the face shields was still an unsettled issue. RX 15, RX 16 at 8, RX 19 at 2. Significantly, the February 28 meeting minutes quote McNabb, an Engineering Division manager, as stating that he thought that a catchall provision in the NEOPs allowed for the immediate addition of the face shields. RX 19 at 7-8. We therefore find that Sottile met with substantial resistance when he pressed Carry for permission to wear face shields.

In addition, Sottile testified that A Group PTs greeted safety concerns raised by other W55 PTs at daily stand-up meetings with derisive comments like, "Don't panic," or hostile, glaring looks. Sottile said that such behavior made the W55 "a very harsh place to work." HT 59-60, 62-64 (Sottile). Sottile identified few remarks or actions that were directed at him personally, but one notable incident did occur after the W55 staff completed the teamwork training in April. Sottile testified that A Group PT Barton walked up to him in a plant break room and pulled a velcro strip on Sottile's overalls, while commenting that he could "hit somebody" and not be held accountable. HT 138-40, 177-79 (Sottile). Sottile complained to Cole about Barton's threatening action. HT 179 (Sottile). Neither Barton nor Cole testified regarding the incident, but a timeline of relevant W55 events prepared by Cole refers to it. RX 97 at M&H000249. Although the Respondent's counsel asked Sottile whether he thought Barton's action and remark had been made in jest – which Sottile denied – the Respondent offered no evidence that Barton had been joking or that Sottile had unreasonably misunderstood Barton's actions. Accordingly, we find that Sottile was subjected to antagonistic remarks by co-workers and a physically threatening action. On November 19, Sottile filed his ERA complaint, alleging a hostile work environment and retaliatory non-selection for promotion. ALJX 6.

[Page 34]

On November 26 Sottile supported McQuay in the detonator cable incident. HT 140-42 (Sottile). As already discussed, Brito and Harter became angry when McQuay and other PTs insisted that an engineer examine the cable. Sottile was also present the following day, November 27, when Harter became extremely angry upon learning that DOE representative Ross had stopped Sottile and Williams while they were on their way to pick up the W55 work area keys. Sottile testified that after Williams took one of the two keys required to open the W55 work area and left, Sottile directed Rodriguez to re-lock

the other W55 lock because he believed that Harter's emotional state was such that it would violate Personnel Assurance Program guidelines for Harter to handle nuclear weapons at that time. HT 133-35, 179-83 (Sottile); *see* CX 88 at M&H003311 (PAP guidelines). Sottile's testimony on this point is uncontradicted and is also supported by management's discipline of Harter for his angry remarks on that occasion. HT 1024-26, 1788-89 (Angelo, testifying that discipline imposed on Harter was based on Harter's angry demonstration).

Furthermore, according to McQuay's uncontradicted testimony, Sottile was present and supported McQuay in the confrontation with Brito and Hoops regarding the inaccurate photograph of the fire deluge system gauges on the pre-ops checklist. HT 814-15 (McQuay). McQuay also testified that Sottile was reassigned to work with the Facilities Management division later that day. HT 816, 838-39 (McQuay); *see* HT 1561-63, 1576-77 (Cole, testifying that he only recalled that Sottile was among the last PTs working in the W55 bay at the end of the program, and that Sottile was then reassigned to work with the Facilities division); *see also* §IIE2 discussion of McQuay's reassignment and disposition of that issue in n.27 *supra*; RD&O at 67-68 (rejecting claim regarding Sottile's temporary reassignment). Based on the foregoing evidence concerning the November 26, 27 and pre-ops checklist incidents, we find that Harter and Brito subjected Sottile to direct or second-hand harassment, or both.

Finally, Sottile testified that in December he assisted in the DOE's on-site investigation of the use of uncertified workers on the W55, a situation which Sottile had reported. HT 133-37, 210 (Sottile). He also reported to the DOE that a cutting wheel that had been replaced without the assistance of qualified personnel was producing sparks, thereby creating a serious hazard because of the proximity to explosive materials. HT 115-19 (Sottile). Sottile's testimony regarding these activities is supported by the testimony of the DOE representative Ross. HT 553-58 (Ross). In addition, Angelo testified that four supervisors – including Pontius and Brito – were relieved of their supervisory responsibilities as a result of the investigation by DOE into the use of uncertified workers. HT 1812-15 (Angelo); *see* CX 69 (Angelo's December 6, 1996 memo to managerial staff regarding removal of supervisory personnel and reminding that "the qualification of people [is] no less important to the Process Safety Envelope than preop checks are to the Facility Safety Envelope," and advising that he will recommend termination for negligent failure to check workers' qualifications). Sottile testified that, after he left the W55 program, Harter not only failed to exchange greetings with him when they crossed paths around the plant, but he was also openly rude. HT 210 (Sottile). This testimony is supported by that of Byrd, who testified to similar experiences with Harter, Brito and Pontius, sometimes when he was accompanied by Sottile. HT 1141-43, 1151-52 (Byrd). Sottile testified that he believed the supervisors' behavior was related to his protected activities on the W55. HT 119-20, 183-87, 210 (Sottile). Based on the foregoing evidence, we find that Harter, Brito and Pontius were hostile toward Sottile during the months immediately following Sottile's departure from the W55 because he reported the use of uncertified workers.

On December 17, Sottile amended his ERA complaint to add further HWE allegations. ALJX 6.

4. Complainant Olguin

Over the course of the W55 program Olguin initiated fewer safety-related concerns than McQuay, Sottile and Williams, but he did support them when they voiced safety concerns. *See, e.g.*, HT 227-28 (Williams), 850-51, 895-97, 948-49 (Olguin). Carry initially could not recall Olguin raising a safety issue, but on cross-examination he remembered that Olguin had raised a question regarding person-to-person coverage during certain phases of the disassembly process. HT 1472, 1475-76 (Carry). The minutes of the W55 safety meetings held in February also quote Olguin as voicing concerns about respirable radioactive particles and about friction arising when the B Group PTs asked safety-related questions. RX 14 at 2; RX 16 at 3, 4; RX 18 at M&H000301. Like Williams and McQuay, Olguin testified that he also was intimidated by the hostile remarks and actions in the safety meetings held in February. HT 857-58, 915-21 (Olguin).

We also credit Olguin's testimony that he was intimidated when the A Group expressed satisfaction about Williams' reassignment. According to Olguin, A Group PTs Dubose and Barton told him that they had "voted [Williams] out." HT 859-60 (Olguin). Although four A Group members testified that they had not actually voted, none of them refuted Olguin's testimony regarding the remarks made to Olguin. HT 575 (Stone), 612-13 (Dubose), 733-34 (Barton), 1372 (F. Rodriguez). Furthermore, two of the A Group PTs testified that they were seeking Williams' reassignment when they complained to Herring on March 6. HT 580-81 (Stone), 633 (Heuton). We fully credit Olguin's testimony on this point and find that supervisors and A Group members intimidated Olguin in February and March.

Olguin also testified that W55 supervisors and A Group PTs were overtly hostile when he raised safety concerns during the remaining months of the W55. HT 864-80, 927-30, 932, 949-50, 1984-85 (Olguin). A Group PT Moore reacted angrily to Olguin's suggestion that he follow prescribed guidelines for tool de-contamination. HT 866-69 (Olguin), 1328-33 (Moore). Harter and Cole became angry because Olguin and Byrd again requested that a pressurized eye-wash be replaced because of its "borderline" pressure reading. HT 877-80, 927-30, 949-50 (Olguin), 1130-33, 1182-83 (Byrd); *see* HT 1501-03 (Harter), 1555-56 (Cole, testifying that eye-wash was covered by pre-ops checklist); discussion *supra* at §IIE2 regarding Angelo's emphasis on accurate completion of pre-ops checklists. In fact, the testimony of Harter and Cole supports Olguin's account and confirms the adversarial mindset that lower and middle-level supervisors on the W55 repeatedly demonstrated toward the Complainants. HT 1503 (Harter), 1560 (Cole). We find that Olguin was the target of hostile remarks by W55 supervisors and A Group PTs after the team-building training and NEOPs review in April. Olguin was reassigned from the W55 to the W69 in early November. HT 932-34

(Olguin). He filed his hostile work environment complaint under the ERA on November 19, and amended it to include additional HWE allegation on December 17. ALJX3.

5. Complainant Byrd

Byrd, like Olguin, raised fewer concerns independently than did McQuay, Sottile and Williams, but joined them in pressing safety issues. *See, e.g.*, HT 227-29 (Williams), 1119-20, 1170-71, 1195-96 (Byrd). Since Byrd did not arrive on the W55 line until late March, he did not witness the conflicts that arose soon after the others arrived. Byrd did attend the W55 safety meeting on February 29, however, and testified that he overheard Stone's disparaging comment about losing overtime because of the re-tooling shut-down. HT 1126-27, 1160-62 (Byrd).

[Page 36]

Upon his arrival Byrd was greeted by A Group PT Barton, who abruptly asked him if he had come to work on the W55 or to shut it down. HT 1124 (Byrd); *see* HT 1173-77 (Byrd). Although Barton denied making the remark, HT 1302-03, we find that Byrd's account is more reliable. The record indicates that Byrd was a candid witness. In contrast, we find that Barton's recall at the hearing was faulty. Barton testified that he could not remember attending a follow-up meeting that Herring held on March 6 to advise six A Group PTs that Williams was being reassigned to the W70. HT 1303-07 (Barton, being questioned about Herring's time line, in evidence as RX 43). We find this particularly significant in view of the fact that it was Barton who had scheduled a meeting earlier in the day with Herring, which then led to Williams' reassignment. HT 1060-61 (Herring), 1291-93 (Barton); RX 27. A reasonably reliable witness would have recalled a follow-up meeting in which Herring told the A Group PTs that their request for Williams' reassignment had been, in effect, granted. It is also significant that Barton denied that he carried high explosives without proper safeguards although three Complainants testified otherwise. *Cf.* HT 1297-99 (Barton) *with* HT 273-74 (Williams), 861-63 (Olguin), 1973-74 (Sottile). We therefore find that Barton greeted Byrd with a remark that was clearly antagonistic to whistleblowing activity when Byrd arrived to begin work on the W55.

Byrd testified that Harter responded "very angrily" when PTs raised issues of non-compliance with safety guidelines or questions about specific units that were being dismantled. HT 1138-39 (Byrd). Byrd, like McQuay and other Complainants, said that his requests that W55 supervisors not store an excessive number of radioactive units in the W55 work area were unsuccessful. HT 1127-30, 1178-82, 1193-96 (Byrd); *see* §IIE2 discussion of McQuay's request that the number of units in work area be limited, *supra*. As previously discussed, Byrd joined Olguin in pressing for a replacement eye-wash, which required "prolonged bickering" with Cole and Harter. HT 877-80, 927-30, 949-50 (Olguin), 1130-33, 1182-83 (Byrd); *see* HT 1501-03 (Harter), 1555-56, 1560 (Cole). Based on the foregoing evidence, we find that Cole and Harter were hostile and resistant toward Byrd when he expressed safety concerns.

Byrd was reassigned to the W69 program on November 4. HT 1139 (Byrd). He filed a hostile work environment complaint under the ERA on November 19 and amended it on December 17 to include further HWE allegations. ALJX 5. Like Sottile, Byrd testified that, after he left the W55 and filed this complaint, Harter, Brito and Pontius were either ominously silent or openly rude. HT 1141-43, 1151-52 (Byrd); *see* HT 210 (Sottile). We therefore find that Harter, Brito and Pontius were hostile toward Byrd during the months immediately following his departure from the W55 because of protected activity.

6. Complainant Rodriguez

Rodriguez was less active in pursuing safety concerns than the other Complainants, especially during the first half of the W55 program. *See* RX 14–20. Consequently, he was not personally targeted for the same hostile remarks as the other, more active, Complainants during the W55 training period and the initial months on line. *See* HT 958-63, 966-67, 971-75 (Rodriguez). However, when he did join other PTs in voicing safety issues, lower level supervisors demonstrated anger toward him. Most of these incidents arose when the PTs objected to a supervisor's disregard of NEOPs, or to the use of defective tools in violation of safety guidelines. HT 799-803 (McQuay), 958-63, 966-67, 971-75 (Rodriguez), 1134-35 (Byrd).

[Page 37]

In December Rodriguez supported McQuay in objecting to signing off on the pre-operations checklist because of the inaccurate photograph of the fire deluge system gauges. Like McQuay, Rodriguez testified that Brito, along with Hoops, a Facilities Management supervisor, reacted quite angrily and, later that day, Rodriguez was assigned to custodial work under the direction of the Facilities Management Division. HT 960-63, 972-73 (Rodriguez); *see* §IIE2 discussion of McQuay's reassignment and n.27 *supra*. Consequently, we find that Rodriguez experienced hostility and anger from W55 supervisory personnel when he voiced concern about safety matters. Rodriguez filed his ERA complaint on November 19. ALJX 4. On December 17, Rodriguez amended the complaint to include further allegations in support of his HWE claim. *Id.*

F. Conclusion that Complainants have established an actionable level of hostility related to protected activity

We reiterate the legal standard for establishing an ERA HWE. Before establishing a basis for employer liability, an ERA complainant must establish by a preponderance of the evidence:

- 1) that he engaged in protected activity;
- 2) that he suffered intentional harassment related to that activity;
- 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment;

4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the Complainant.

See Berkman v. U.S. Coast Guard Academy, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, slip op. at 16-17, 21-22 (ARB Feb. 29, 2000); discussion *supra* §IIB. We have concluded that the Complainants engaged in protected activity and suffered intentional harassment related to that activity. *See* discussion *supra* §§IID1, 2, 3. It remains for us to determine the level of hostility the Complainants have demonstrated and whether that hostility would have detrimentally affected a reasonable person and actually did detrimentally affect each of the Complainants.

To evaluate the level of hostility – *i.e.*, whether the Complainants have established the existence of an abusive working environment – requires consideration of the factors from *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993), factors, discussed above: the frequency and severity of the harassment; whether the harassment was physically threatening or humiliating, or merely offensive; and whether it unreasonably interfered with the complainant's work performance. *Berkman*, slip op. at 16-17 (quoting *Harris*, 510 U.S. at 23); In applying these factors we employ an objective standard and consider the impact that the harassment would have on a reasonable person, and the actual impact on the Complainants. *Berkman*, slip op. at 21; *see Harris*, 510 U.S. at 21-22; *Green v. Adm'rs of the Tulane Educational Fund*, 284 F.3d 642, 655-56 (5th Cir. 2002)(arising under Title VII). The *Harris* factors are illustrative and not a definitive list of requirements that must be met in order to establish an actionable level of hostility. *Harris*, 510 U.S. at 23. We consider all the "surrounding circumstances, expectations and relationships" in evaluating the workplace environment. *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81-82; *see Berkman*, slip op. at 16 (quoting *Harris*, 510 U.S. at 23); We again emphasize that, above all, our evaluation of the workplace environment must serve the purpose of ERA whistleblower protection, which is to promote nuclear-related health and safety by encouraging the raising of safety related concerns. *See* discussion *supra* §IIB.

The harassing incidents included in the foregoing summaries consist primarily of contentious remarks made by co-workers and supervisory personnel in response to the Complainants' safety-related concerns. Also included are four incidents involving express or implied threats of violence against Williams and Sottile. Consistent with the guidance provided by *Oncale*, the Board has carefully considered the "rough-and-tumble" plant culture where these HWE complaints arose. Although we recognize that the permissible range of give and take in the W55 workplace was broad enough to permit occasional intemperate remarks by PTs and lower level supervisors, the incidents evidenced in this case go far beyond that range. Instead, the antagonistic remarks were frequent and could only have had a chilling effect on voicing nuclear safety-related concerns. The mocking tone of many of the remarks, along with the threats of violence, contributed to an environment in which the prospect of ridicule and intimidation for engaging in protected activity was constant. *Cf. Smith v. Esicorp, Inc.*, No. 93-ERA-00016, slip op. at 24-27 (Sec'y Mar. 13, 1996) (holding that sarcastic and derogatory cartoons, which depicted the

complainant as a NRC whistleblower and were displayed on a lunchroom drawing board, contributed to a hostile work environment).

[Page 38]

Furthermore, the PTs were required to constantly consider nuclear safety – how best to avoid an accidental detonation and undue radiation exposure – and they were responsible for voicing their concerns. In view of the hostile response provoked by the raising of safety concerns on the W55, actual hostility or the potential for harassment pervaded all aspects of the Complainants' work. For example, when the Complainants encountered an anomaly in the construction of a weapon or the need to replace malfunctioning equipment, they faced the choice between provoking a confrontation with their immediate or second-level supervisor or both, remaining silent despite their well-founded safety concerns. We therefore find that the hostility on the W55 was pervasive.

The Board also finds that the hostility had a tangible impact on the performance of the Complainants' jobs. Harter testified that Williams and Sottile were good technicians, and the record does not suggest that the other Complainants had not performed their duties satisfactorily. HT 1515 (Harter). Nonetheless, the animosity toward the Complainants clearly affected work relationships on the W55, particularly during the early months of 1996. *See* CX 2, 4. When conflicts between the A Group PTs and the Complainants persisted following the teamwork training in April, the first-line supervisors segregated most of the A Group from the Complainants, assigning the A Group primarily to the cell and the B Group primarily to the bay. HT 176-77, 211-12 (Sottile), 322-23 (Williams), 800-01 (McQuay), 1441-42, 1443 (Pontius). Although this helped to reduce interaction between the A Group PTs and the Complainants, it interfered with the maintenance of each PT's certification to perform the respective operations in the bay and the cell. HT 135, 176-77, 211-12 (Sottile); *see also* HT 1522 (Harter, testifying that supervisors "switched people around to try and keep them current in both operations"). DOE restricts the use of PTs in an operation – like either the W55 cell or the mechanical bay – where they are not currently certified. *See* HT 135-37 (Sottile), 553-58 (Ross), 1812-15 (Angelo). Assignment of the Complainants almost exclusively to the mechanical bay operation constituted an improper change in their working conditions. *Cf. Berkman*, slip op. at 17 (curtailing complainant's environmental compliance duties contributed to hostile work environment).

In sum, the harassing incidents were severe, frequent and pervasive, and produced an abusive work environment in which the Complainants' conditions of employment were altered. The harassment would have detrimentally affected a reasonable person and did so affect the Complainants. We thus conclude that the Complainants have established that they were subjected to a level of harassment related to protected activity that is actionable under the ERA.²⁸ We next address the Respondent's liability for this hostile work environment.

G. Liability for the hostile work environment

1. *Varnadore* (1996) and the negligence standard.

The ARB addressed the issue of employer liability for supervisory harassment that contributed to a hostile work environment in *Varnadore v. Oak Ridge Nat'l Laboratory*, ARB/ALJ Nos. 92-CAA-2, -5, 93-CAA-1, 94-CAA-2, -3, 95-ERA-1 (ARB June 14, 1996) (*Varnadore* (1996)). That case, originally brought under five of the Part 24 environmental protection statutes but not the ERA, involved an employee's memorandum to a company attorney, which referred to Complainant Varnadore and his recent whistleblower complaint against the company. A mid-level supervisor posted the memorandum on a company bulletin board. Higher management reacted immediately after learning about the posting. The division director called the offending supervisor into a meeting, informed him that the posting was inappropriate, and followed up with a memo telling the supervisor to be "extra cautious in the future and avoid episodes like this." *Varnadore* (1996), slip op. at 69-70, 76-78.

[Page 39]

The ALJ held that the memo ridiculed Varnadore and that posting the memo was retaliation for bringing the whistleblower complaint. The Secretary concurred. The Board was eventually asked to determine whether this incident created a hostile work environment. *Id.* at 70.

Initially, the Board noted the Secretary's earlier determination that the concept of a hostile work environment applied to whistleblower cases. However, it concluded that the incident was isolated rather than pervasive and regular. Varnadore had not therefore, established that a hostile work environment resulted from this incident. *Id.* at 70-73. Nevertheless, the Board examined the company's reaction to the memo posting. It began by noting that the Supreme Court, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), clearly stated that employers are not to be held absolutely liable "for the acts of their supervisors regardless of the circumstances of a particular case." *Id.* at 73. The Board then adopted the Sixth Circuit's rule for determining an employer's liability for supervisory harassment that creates a HWE:

In a hostile working environment claim, the determination of whether an employer is liable for its supervisor's actions depends on 1) whether the supervisor's harassing actions were foreseeable or fell within the scope of his employment and 2) *even if they were, whether the employer responded adequately and effectively to negate liability.*

Varnadore (1996), slip op. at 75, citing *Pierce v. Commonwealth Life Ins. Co.*, 40 F.3d 796, 803 (6th Cir. 1994) (emphasis added). The Board also cited a similar holding in the Second Circuit's *Karibian v. Columbia Univ.*, 14 F.3d 773, 780 (1994). *Varnadore* (1996) slip op. at 74-75. Then, applying *Pierce*, the Board concluded that management's response had been immediate and effective and, therefore, "sufficient to negate any possible liability for [the supervisor's] actions." *Id.* at 76-78.

The Board applied what is typically referred to as the negligence, or notice liability, standard for evaluating employer liability in supervisory harassment Title VII cases. *See* Elizabeth M. Brama, *The Changing Burden of Employer Liability for Workplace Discrimination*, 83 Minn. L. Rev. 1481, 1493-94 and authorities there cited (1999). The negligence standard is also referred to as a theory of direct liability because it looks to the employer's actions, rather than those of the harassing employee, to determine whether liability will attach. *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 758-759 (1998); *Williamson v. City of Houston*, 148 F.3d 462, 465-66 (5th Cir. 1998) and cases there cited; *see* Brian C. Baldrate, *Agency Law and the Supreme Court's Compromise on "Hostile Environment" Sexual Harassment in Burlington Industries, Inc. v. Ellerth and Faragher v. City of Boca Raton*, 31 Conn. L. Rev. 1149, 1155-61 (1999); David Benjamin Oppenheimer, *Exacerbating the Exasperating: Title VII Liability of Employers for Sexual Harassment Committed by Their Supervisors*, 81 Cornell L. Rev. 66, 97-98 (1995).

The negligence standard is the only one Federal courts have applied for determining liability in co-worker harassment Title VII HWE cases. *Faragher v. City of Boca Raton*, 524 U.S. 775, 799 (1998); *see Wright-Simmons v. City of Oklahoma City*, 155 F.3d 1264, 1270 (10th Cir. 1998) (Title VII case involving race-based hostile work environment); *see also Varnadore* (1996), slip op. at 77-78 (discussing standard for employer's remedial action for co-worker harassment under the Title VII case of *Baskerville v. Culligan International Co.*, 50 F.3d 428, 431-32 (7th Cir. 1995)). Furthermore, in the wake of *Ellerth* and *Faragher*, discussed below, the negligence standard remains viable. Federal courts continue to apply the negligence test to determine employer liability for supervisory harassment in Title VII cases. *See, e.g., Dees v. Johnson Controls World Services*, 168 F.3d 417, 421-22 (11th Cir. 1999); *Wilson v. Tulsa Junior College*, 164 F.3d 534, 541 n.4 (10th Cir. 1998).

Under the negligence standard, an employer is liable for an employee's harassing conduct if the employer knew, or in the exercise of reasonable care should have known, of the harassment and failed to take prompt remedial action. *See Miller v. Kenworth of Dothan, Inc.*, 277 F.3d 1269, 1278 (11th Cir. 2002); *Wilson*, 164 F.3d at 540-43. To avoid liability an employer must take both preventive and remedial measures to address workplace harassment. *Wilson*, at 540-42. An employer who fails to provide an adequate procedure for raising harassment complaints has not exercised reasonable care to ensure that it receives notice of the harassment, and cannot thereafter successfully defend on grounds that it did not receive actual notice. Instead, the employer will be deemed to have constructive notice of the harassment. *See Sharp v. City of Houston*, 164 F. 3d 923, 930-31 (5th Cir. 1999); *Wilson*, 164 F. 3d at 542. Constructive notice may also be imputed to the employer if the harassment was so severe and pervasive that management should have known about it. *See Miller*, 277 F.3d at 1278-79. Once an employer has been put on notice of the harassment, the question becomes whether the employer has addressed the harassment claim "adequately and effectively." *Varnadore* (1996), slip op. at 74-75, discussed *supra*.

2. Arguments of the parties.

The ALJ found that co-worker harassment existed on the W55, but he concluded that it was not related to protected activity. Nevertheless, he addressed management's efforts to correct the harassment, and, applying a negligence analysis, determined that the Respondent had acted "promptly and responsibly to correct" the hostilities on the W55. R.D.&O. at 1-2, 63-64; *see* RD&O at 61-64. The Complainants assert that the ALJ erred in finding that the Respondent took prompt remedial action. They urge us to apply the vicarious liability standard for determining an employer's liability which the Supreme Court established in the *Ellerth* and *Faragher* decisions, cited above and discussed more fully below. The Complainants also contend that, even under a pre-*Faragher* analysis, the Respondent cannot avoid liability. Comp. Supp. Reply at 6-7, 8-10, 21-25. The Respondent asserts that the *Ellerth* and *Faragher* standard does not apply because this is an ERA case and does not involve supervisory harassment. Alternatively, the Respondent argues that, if necessary, it is entitled to rely upon the *Ellerth* and *Faragher* affirmative defense because it took no tangible employment action against the Complainants, the essential condition precedent for invoking the defense. Resp. Supp. Brief at 2-12, 19-23, *see* discussion, *infra*.

We now explain why we conclude that the *Varnadore* (1996) negligence analysis is the proper standard for determining employer liability in this ERA hostile work environment case involving both co-worker and supervisory harassment.

3. The *Ellerth* and *Faragher* affirmative defense and the Board's conclusion about the employer liability standard.

After the Supreme Court's 1986 decision in *Meritor*, but prior to *Ellerth* and *Faragher* in 1998, the Courts of Appeals developed variations on the themes of strict, vicarious, and notice liability and applied different standards to determine employer liability under Title VII where a supervisor's sexual harassment created a hostile work environment. *See* Oppenheimer, 81 Cornell L. Rev. at 131-40 and cases there cited; Fredrick J. Lewis and Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. Mem. L. Rev. 667, 674-76 (1995). These divergent standards prompted the Supreme Court to grant certiorari in *Ellerth* and *Faragher*. *Ellerth*, 524 U.S. at 749-51; *Faragher*, 524 U.S. 785-86.

These two decisions modified the standards that had been developing since *Meritor*. The Court essentially struck a compromise between imposing strict liability on the employer and requiring an employee to establish that the employer had been negligent. *See* Baldrate, 31 Conn. L. Rev. at 1176. Where the complainant establishes an actionable hostile work environment created by supervisory harassment that culminates in a "tangible employment action," the employer is liable. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 764-65. Where, however, the employee suffered no tangible employment

action, the Court shifted the burden of proof and permitted the employer to raise an affirmative defense to liability or damages for supervisory sexual harassment. The employer must show, by a preponderance of evidence, that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior" and that the employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

[Page 41]

The Board posits three reasons for not applying the *Ellerth* and *Faragher* standard to this case. First, the Court's reasoning in those decisions contains numerous points suggesting that the analysis is specifically tailored to address employer liability in sexual harassment, rather than other harassment prohibited by Title VII. *Faragher*, 524 U.S. at 787-88, 794-96, 798-99; *Ellerth*, 524 U.S. at 754-55. This impression is reinforced by the dissenting opinion of Justice Thomas, who expressed his concern that the majority was improperly establishing a liability standard applicable to sexual harassment cases only, and his view that employer liability for both racial and sexual harassment should attach only if the employer were at fault. *Ellerth*, 524 U.S. at 767-74 (Thomas, J., joined by Scalia, J., dissenting); see *Faragher*, 524 U.S. at 810-11 (Thomas, J., joined by Scalia, J., dissenting) (incorporating reasoning from *Ellerth* dissenting opinion).²⁹

Furthermore, the sexual harassment at issue in *Ellerth* and *Faragher* is an especially vexing form of employment discrimination that frequently is perpetrated surreptitiously by a supervisor who wants to personally exploit the victim's presence in the workplace. See, e.g., *Meritor*, 477 U.S. at 59-61; *Mota v. Univ. of Texas Houston Health Science Ctr.*, 261 F.3d 512, 516-17 (5th Cir. 2001); *Karibian*, 14 F.3d at 775-76; see also *Ellerth*, 524 U.S. at 760 (the workplace may provide a "captive pool of potential victims"). This type of sexual harassment contrasts sharply with the openly hostile or demeaning remarks of a supervisor who wants to drive an employee from the workplace. Whistleblower harassment, like race-based harassment, is a form of public ridicule and is often intended to pressure the employee to leave the workplace. See, e.g., *Miller*, 277 F.3d at 1273-74; *Spriggs*, 242 F.3d at 181-90. Finally, we note that the harassment in *Ellerth* and *Faragher* included invasive physical touching, so often common to sexual harassment. Physical touching is usually covert and differs significantly from the whistleblower scenario, where the harasser is less likely to be interested in personal exploitation than in driving the employee from the workplace. See *Faragher*, 524 U.S. at 782; *Ellerth*, 524 U.S. at 748; *Oncale*, 523 U.S. at 77; *Meritor*, 477 U.S. at 59-61.

We conclude that the *Varnadore* (1996) negligence analysis is the proper standard for determining whether the Respondent is liable for the co-worker and supervisory harassment we have found the Complainants suffered. As we have explained above, the Board is convinced that the *Ellerth* and *Faragher* employer liability test applies to sexual harassment hostile work environment cases, not these ERA whistleblower claims.

Furthermore, the Complainants have not provided us with a reasoned basis for abandoning the Board's *Varnadore* (1996) standard.

Nevertheless, as the discussion, *infra*, of the Respondent's preventive and corrective efforts indicates, under either analysis we conclude that the Respondent is not liable for the hostile work environment.

4. The Respondent's preventive and corrective actions

a. The November 1995 – May 1996 period

We agree with the ALJ's finding that the evidence does not establish that the Respondent knew or should have known about the hostile work environment on the W55 and failed to take appropriate action. *See* RD&O at 61-64. Our analysis regarding the Respondent's liability differs from that of the ALJ, however, largely because we – unlike the ALJ – have concluded that supervisory *and* co-worker harassment created a hostile work environment on the W55.

We begin by explaining how the actions taken by the different levels of management are viewed for purposes of this liability analysis. The lower and middle level supervisors responsible for W55 operations contributed to the hostile work environment, and to gauge the Respondent's exercise of reasonable care as outlined in *Varnadore* (1996), we look to higher management's discharge of its responsibilities to prevent and correct such harassment. *See Waymire v. Harris County*, 86 F.3d, 1424, 428-29 (5th Cir. 1996). Higher management includes Weinreich, the plant manager, and Angelo, head of the Manufacturing Division. Our inquiry covers two basic issues. First, the Board considers when higher management was put on notice of the hostile work environment, through either actual or constructive notice. In connection with the constructive notice inquiry, we examine the complaint procedures that were in place to facilitate receipt of notice by higher management. Second, we evaluate the remedial actions taken in response to notice of the harassment. *See Varnadore* (1996), slip op. at 74-78. Since the co-worker harassment was closely connected with the supervisory harassment, we will examine higher management's exercise of care as it relates to harassment from both sources, together. In addition to the case law cited in *Varnadore* (1996), we look for guidance to Federal court decisions addressing negligence as a basis for employer liability in hostile work environment cases.

[Page 42]

Before discussing when higher management received actual notice of the harassment against the Complainants, we address the procedures that were available at the Pantex plant for providing such notice. The record establishes that the Respondent had a published whistleblower protection policy and a means for filing reprisal complaints that had been in place at least since August 1993. RX 9, 132, 144; HT 1843-45 (Weinreich). That policy encouraged employees to raise concerns regarding "unsafe, unlawful,

fraudulent, or wasteful practices," and it forbade reprisal against whistleblowers who raised such concerns, internally, to DOE, or to Congress. RX 9, 132, 144. In addition, the policy, which was disseminated as a bulletin to Pantex employees, stated that employees who declined to engage in practices that they believed to be "illegal or dangerous" would not be retaliated against. *Id.* The bulletin also provided employees with the names and telephone numbers of management," personnel they could contact to file complaints of reprisal. *Id.*

In November 1995, plant manager Weinreich issued a bulletin advising employees that an Employee Concerns Program (ECP) had been established as "a formal system through which employees may report concerns associated with safety, health, security, environment, fraud, waste, abuse or mismanagement," or reprisal for raising such concerns. RX 133; HT 1845-46 (Weinreich). Weinreich testified that the ECP was set up pursuant to DOE directive, and that he had transferred the ECP from the Human Resources division to his direct supervision in order to make it independent of the usual chain of supervisory command. HT 1845-46, 1910, 1913-14 (Weinreich). Weinreich also testified that other avenues, including telephone hotlines, were available for employees to raise concerns within the plant. HT 1846, 1901-02 (Weinreich); *see* RX 103; HT 1647-48 (Robin McLaurin, ECP Manager.).

The evidence establishes that Weinreich was not made aware of the anti-whistleblower harassment until late in March 1996. Although the lower and middle-level supervisors then assigned to the W55 – Herring, Brito, Carry, Long, and Pontius – were aware of hostilities among W55 personnel and were contributing to the hostility toward the Complainants, higher management was not given an accurate picture of what had transpired on the W55 until Weinreich received Meyer's investigative report, CX 2, in late March. Prior to that time, Weinreich's actual knowledge of conflicts among W55 personnel was limited. He had attended part of the safety meeting held by Carry and Herring on February 29, had a brief meeting with Barton and Heuton when Herring brought them to his office on February 29, and had been advised by Herring of the A Group's complaints about Williams on March 6. *See* HT 1054-59, 1258-60 (Herring); 1017-22, 1753-55 (Angelo); 1921-26 (Weinreich). Around February 23, Weinreich and Angelo had received a copy of Williams' letter to Herring regarding the safety issues Williams had discussed on February 20 with Herring, Carry and Long. CX 27; RX 43; HT 1019-22, 1753-55 (Angelo), 1242 (Herring). That letter did not, however, complain of hostilities on the W55 operation. RX 13/CX 24.

The record also contains no suggestion that any of the Complainants had filed a harassment complaint with ECP or had proceeded through other channels prior to March 6, which is when Weinreich appointed Meyer, another manager, and union official Frank George to investigate the W55 hostility issues that were presented to Weinreich by Herring. Weinreich did receive a letter from Williams on March 8 concerning hostilities on the W55. HT 1865-66 (Weinreich); CX 28. Weinreich replied with a letter asking Williams to cooperate with ECP head McLaurin in an investigation of Williams' concerns, which Weinreich would then review. HT 1866-67 (Weinreich); RX 30. Williams did not accept this suggestion but instead met with McLaurin on March 27 and

asked for a meeting with Weinreich, the Legal Department, and ECP staff. HT 1866-67 (Weinreich), 1630-33 (McLaurin); RX 110. The meeting was held on April 2. HT 308-11, 471-73 (Williams), 1867-70 (Weinreich); RX 41. By this time, of course, Weinreich had received Meyer's report. HT 1867-68 (Weinreich); *see* CX 2. We conclude that, prior to receiving Meyer's report in late March, neither Weinreich nor other high level managers had actual knowledge that intervention to address harassment of the Complainants was warranted. *Cf. Sharp v. City of Houston*, 164 F.3d 923, 929 (5th Cir. 1999) (in Title VII case, employer has actual knowledge of harassment when higher management or someone who can remedy the problem receives notice).

[Page 43]

We further conclude, based on the whistleblower protection policy that was in place, that the Respondent had exercised due care to ensure that a "reasonable avenue for complaint" was available. *See Varnadore* (1996), slip op. at 74-75; *cf. Sharp*, 164 F.3d at 931-32 (evidence that city provided no viable means for reporting harassment in a police unit that was isolated from higher management supported a finding of constructive notice). Consequently, the evidence does not establish that higher management should have known, in the exercise of reasonable care, that intervention to address the harassment was warranted until it received the Meyer report in late March.

We turn now to the remedial action higher management took to address that harassment, beginning with the April 2 meeting with Williams and his attorney. At this meeting, Weinreich agreed that Williams would be reassigned to the W55. HT 1867-68 (Weinreich); RX 41. To prepare for Williams' reintroduction to the program, Angelo met with W55 PTs on April 2 to explain that Williams was returning and to caution them that reprisals against whistleblowers would not be tolerated. HT 1779-80 (Angelo); RX 42, RX 79 at M&H000018-19, RX 97. He also attempted to appeal to a sense of team-work and camaraderie among the A Group PTs who were antagonistic to Williams. RX 97 at M&H000248 (Cole's summary of Angelo's remarks, including, "[Williams] was removed from his position, how would you feel"); *see also* HT 489-91 (Williams, testifying that he objected to Angelo's remarks because Williams did not want to be "classified as a whistleblower."). Of more far-reaching effect, however, was the April shut-down of W55 operations for training and a NEOPs review, which Weinreich and Angelo initiated. *See* RX 40, 62. Cole testified that, upon replacing Carry as the W55 Program Manager in late March, he was directed to immediately complete work on a training plan to address the hostile work environment covered in Meyer's report. HT 1531-34 (Cole); *see* HT 1762-66 (Angelo); RX 43, 97. In April, the entire W55 staff was scheduled to complete 40 hours of instruction regarding team-building and other workplace interaction. HT 1533-35, 1541 (Cole), 1680-81 (Robert Rowe, Human Resources Manager), 1763-64 (Angelo); *see* HT 475-80 (Williams). Higher management's decision to involve the W55 PTs and other staff in a review and modification of the W55 disassembly process, along with the team-building and related training, was a significant step in addressing the hostile work environment. *See* RX 40, 62; HT 1535-39 (Cole), 1766-68, 1772-73 (Angelo). Although management had already initiated a plan to improve W55 – and other – weapons program

training in order to address the training deficiencies that the Complainants had raised and that the Meyer report had confirmed, the NEOPs review and re-write provided validation of the Complainants' concerns about the W55 disassembly process itself. *See* CX 41; RX 45, 79, 116; HT 204-06 (Sottile), 1772-78 (Angelo).

In April and May, higher management also initiated other actions to address friction in the W55 work environment. Management conducted a root cause analysis of the Meyer report findings. CX 3; HT 1815-20 (Angelo). That analysis concluded that supervisory inadequacies contributed to the growth of hostilities on the W55. CX 3. Angelo testified that management hoped to correct these inadequacies through its "W55 Employee Concern Action Plans." HT 1772, 1820, 1833-34 (Angelo); *see* RX 40, 62, 79, 124. In addition to the team-building and related training required of the entire W55 team, those Action Plans provided for higher management to hold separate discussions regarding "lessons learned" and professional conduct with the W55 PTs and a similar discussion with W55 supervisors. RX 79 at M&H000015, 18. Angelo covered that topic in his April 2 meeting with the W55 PTs, and higher management met with the W55 supervisors on April 8. *Id.* at M&H000020; *see* RX 97 at M&H000248. The Action Plans also called for enhancements to supervisory training "to further address employee concerns." RX 79 at M&H000015, 18-20. Angelo distributed a memorandum regarding "Team Building Lessons Learned" to lower and middle level managers on June 4, 1996. RX 63. The memorandum notes that "institutional processes or lack thereof" at the plant had contributed to development of a hostile work environment on "one of our startup activities", and it provides in-depth guidance for avoiding future hostility. *Id.* The memorandum contains two particularly relevant points about how a supervisor should respond when PTs raise safety issues. First, the memorandum states, "Line managers allowed technical issues to become personal and emotional issues," and emphasizes that supervisors must "act promptly on technical concerns and keep them out of the realm of personal issues." *Id.* at M&H002531. The memorandum also states, "[M]anagers have a tendency to 'spotlight' individuals when issues are raised. . . . [T]he technicians tend to do the same thing," and cautions that supervisors "must ensure that no one is made to feel that they are 'on trial' or placed under a magnifying glass." *Id.*

[Page 44]

Changes in supervisory training were initiated in April and May 1996. Robert Rowe, the Human Resources manager, testified that various "sensitivity" courses were added to the mandatory training requirements for managers and supervisors. HT 1656-58 (Rowe); *see* RX 2. He also testified that the plant had already implemented whistleblower training for supervisors in February, and that such training was converted to address the overall handling of employee concerns in March 1996, when a nuclear industry consultant with experience in representing whistleblower interests was engaged to teach the course. HT 1660-62, 1680 (Rowe). In May, management mandated training for middle and lower level supervisors and in July began to schedule further courses in workplace conflict and teamwork, totalling 40 hours of instruction. HT 1658-59, 1679 (Rowe); RX 2. In addition, rank and file employees were required to take a four-hour course concerning

team-building and effective workplace communication. HT 1658, 1662, 1675, 1677 (Rowe). Rowe testified that, by the time the ALJ heard this case in June, 1997, approximately half of the rank and file employees had completed the four-hour course, with the remainder expected to finish by September 1997. Approximately half of the supervisors and managers had completed the 40-hour block of instruction, and the rest were expected to complete that by July or August 1997. HT 1660, 1675 (Rowe); *see* RX 124 at M&H002597.

Weinreich and Angelo were personally involved in addressing hostility on the W55 after receiving Meyer's report. Weinreich met with Williams on April 2. Angelo met with the W55 PTs on the same day to announce Williams' return. Angelo, who was responsible for all the weapons manufacturing programs at the plant, also attended the first and last session of the W55 team-building training in late April, addressed the group, and took questions. RX 51, 59; HT 1768-70 (Angelo); *see* CX 4 at 21-23. An April 26 memorandum from Cole to Angelo, which begins, "Randy [Williams] wanted us to pass on to you a status of the Team training," indicates that Williams recognized Angelo's interest. CX 48; *see* HT 1768-70 (Angelo). Furthermore, Angelo met individually with McQuay, who had missed most of the team building and NEOPs review because of military reserve duty, to discuss the points that Angelo had covered in his remarks to the W55 team earlier in the month. RX 59; HT 798 (McQuay), 1534-35, 1565-66 (Cole), 1770-71 (Angelo). Weinreich testified that, in late April, he and Williams discussed how management was handling the issues that Williams had raised in the April 2 meeting. HT 1870-72, 1876, 1941-43 (Weinreich).

Management began taking these actions within days after Weinreich and Angelo received the Meyer report. These actions addressed safety concerns about the W55 disassembly process and the need to improve co-worker and supervisory response to the raising of those concerns. We find, therefore, that once it received notice of the harassment on the W55, the Respondent took prompt action to correct the hostile work environment. *See Varnadore* (1996), slip op. at 74-75.

We also find that the actions the Respondent took were effective in addressing whistleblower harassment on the W55. *See Varnadore* (1996), slip op. at 74-75. Although the Complainants urge that the staff training, procedures review, and related actions in April 1996 failed to reduce the harassment, the evidence does not support that view. Despite some of the more egregious instances of harassment occurring in the weeks immediately following the April training and NEOPs review – including A Group PT Barton's confrontation with Sottile and Protsman's second off-site confrontation with Williams – the evidence does indicate a reduction in the number of harassing incidents occurring after the April shut-down. *See* discussion *supra* §IIE. The Complainants' testimony indicates that workplace relationships with some formerly antagonistic PTs improved during this period, although Barton was a notable exception. HT 138-40, 175-79 (Sottile), 322 (Williams), 926 (Olguin), 969-70 (Rodriguez). In addition, Angelo and Weinreich gave uncontradicted testimony that no new hostile work environment issues were brought to their attention from late April until late June or early July. HT 1782-83, 1837 (Angelo), 1876 (Weinreich).

A good example of the effect of the April shut-down and training is an incident involving Williams and Pontius. Williams contends that Pontius improperly singled him out for criticism regarding the manner in which he raised safety concerns. CIB 26; CRB 15-16. As discussed in Section IID3, we have found that Pontius demonstrated hostility toward the raising of safety concerns on specific occasions. However, the record does not support Williams' interpretation of Pontius' conduct in this instance. Pontius testified that he made the contested remarks while attempting to provide Williams guidance on how to pursue safety concerns more tactfully. HT 1430-31 (Pontius). Pontius' testimony that Williams initiated this discussion and that it took place after the April training is uncontradicted. That testimony, along with Noonan's findings on this issue, supports the fact that Pontius was attempting to put into practice some of the training he had received concerning team-building. *See* CX 4 at 24; *see also* HT 167-69 (Sottile), 847-49 (Olguin).³⁰

[Page 45]

b. The June – December 1996 period

In late June, Weinreich received an e-mail from George, the chief union official at Pantex, advising that Williams had recently raised issues with George about safety and hostility on the W55. HT 1875-76 (Weinreich). In response, Weinreich set up two meetings between Williams and managerial staff. Weinreich scheduled a July 1 meeting for Williams, George, and, in Angelo's absence, other Manufacturing Division managers, including VanArsdall, Rhoten and W55 middle level supervisor Brito. HT 1877; RX 66; *see* HT 1837-38 (Angelo). Weinreich also scheduled a July 2 meeting with Williams, George and himself. HT 1877-78 (Weinreich); RX 66. After Angelo's return, a follow-up meeting was scheduled between Williams, George, Van Arsdall, Angelo, Rhoten and Cole, to discuss the status of management action on the issues Williams had raised. RX 71.

Williams' concerns ranged from the failure of some PTs to wear personal protective equipment as required during certain W55 disassembly steps to the question of why he had not been certified in the disassembly process. RX 66, 71; RX 97 at M&H000250; *see* HT 325 (Williams). In response, the Manufacturing Division managers addressed Williams' concerns. Weinreich drafted various versions of a plant-wide notice requested by Williams, which related the contributions whistleblowers like Williams had made to plant safety. RX 65, 67, 74, 76, 77; HT 1877-82, 1887-89 (Weinreich). The Respondent submitted documentary evidence that supports Weinreich's testimony that his versions of the notice did not satisfy Williams. *See* RX 65, 67, 77. No notice was issued. *Id.*

In the July 1 and 2 meetings, Williams questioned whether the team-building training had been effective because "some friction" remained among the W55 team members, but the record does not indicate that he reported any specific incidents of harassment in those meetings. RX 66, 71; *see* HT 323-29 (Williams). Williams did report two incidents of harassment directly to Weinreich, in late June or early July, and Weinreich took action on

both. First, Williams testified that he talked to George after Protsman confronted him for the second time, and they both spoke with Weinreich about the need to address the issue with Protsman. HT 324-25 (Williams); *see* CX 4 at 20, 24-25. Weinreich testified that he directed that Protsman be counseled regarding professional conduct, on and off-site. HT 1883-84 (Weinreich). Although Williams testified that Protsman was not counseled until "much later," HT 496-97, Noonan's September investigation found that Protsman had been counseled by that time, CX 4 at 24-25.

The second incident that Williams took directly to Weinreich in early July concerned the FBI investigation that was triggered by a "tip" from the W70 PT who had threatened Williams in March. HT 326-29 (Williams); *see* CX 4 at 25. Specifically, the W70 PT alleged that Williams was disclosing classified information to unknown persons. CX 5 at 000440. The record does not support Williams' argument that Broaddus, the Security and Counter-intelligence Officer at the plant, acted on the "tip" in a manner intended to harass Williams. CIB 28. Rather, the FBI documents in evidence corroborate Broaddus' testimony that he contacted the local DOE office to discuss the information that he had received from the W70 PT, and DOE officials – not Broaddus – contacted the FBI. CX 5 at 000440; HT at 1622-26, 1628 (Broaddus). Furthermore, the FBI documents indicate that Weinreich expressed concern that a further, arguably unwarranted, investigation could create the appearance of retaliation against a whistleblower. CX 5 at 000443-444. Finally, Weinreich's testimony that he directed that the Respondent's own staff not pursue an investigation of the matter is uncontradicted. HT 1882-83 (Weinreich).

[Page 46]

Also in July, Weinreich received feedback from the local DOE office regarding concerns that Williams had raised about the effectiveness of the Pantex Employee Concerns Program. HT 1918-21, 1938, 1939 (Weinreich). Then on July 26, Williams filed his ERA complaint with the OSHA regional office. ALJX 1. Both Angelo and Weinreich testified that they believed the actions they had taken in response to the issues that Williams raised in early July had been satisfactory to Williams. HT 1836-39 (Angelo), 1876, 1884-87, 1891-92 (Weinreich). Weinreich's testimony is uncontradicted that he had two exchanges with Williams after management began to address the issues raised by Williams on July 1 and 2, and that in neither instance did Williams raise any objection to the way the issues were being handled. HT 1884-85 (Weinreich). Weinreich's testimony and a corroborating e-mail from George, who had been acting as intermediary between Weinreich and Williams regarding the various versions of the plant-wide notice that Weinreich had drafted, establish that George also believed that Williams was satisfied with the way management was addressing the issues he had raised. George, too, was surprised when Williams filed the ERA complaint. HT 1885-87 (Weinreich); RX 73.

In August, Mason & Hanger engaged two consultants from the nuclear industry to address issues raised in Williams' ERA complaint and issues about the Employee Concerns Program. First, it hired an industry consultant, who had been providing training

for supervisory personnel, to review the Employee Concerns Program and to make recommendations for enhancements. RX 75; HT 1847-50 (Weinreich). The Respondent also set up an employee committee to provide input regarding the revamping of the ECP. HT 1847-49 (Weinreich). The recommendations for improvements to the ECP were submitted in late August, CX 107, and Weinreich testified that two primary changes had been made by the time the hearing was held. HT 1849-54 (Weinreich). One of the changes was to ensure the confidentiality of the complaint process. HT 1849-50 (Weinreich). The other was to establish an appeals council, composed of individuals from both inside and outside the plant. HT 1850-54 (Weinreich); *see* HT 1721, 1738-40, 1750 (Noonan). Weinreich also testified that one change yet to be made was the addition of an ECP staff person with technical expertise in nuclear issues. HT 1910-12 (Weinreich). Perhaps most importantly, the company requested input about developing the appeals council from the public interest group that provided the Complainants' counsel in this case. HT 1850-51 (Weinreich); *see* HT 1738-40 (Noonan).

The second consultant was Noonan, who was engaged to investigate the issues contained in Williams' July 26 ERA complaint. HT 1694-97 (Noonan). Weinreich testified that the public interest group official who initially served as Williams' legal representative agreed to have Noonan conduct the investigation. HT 1906-07 (Weinreich). Noonan interviewed a number of W55 employees and supervisory personnel and provided a draft report to the Respondent in late September. CX 4 at 1; *see* HT 1694-97 (Noonan). Noonan's investigation was confined to the issues raised by Williams' complaint, and covered the period from Williams' assignment to the W55 program until the time of the investigation. HT 1742, 1747-49 (Noonan). The report provided findings regarding each of forty-five issues and offered recommendations for corrective action by management. CX 4 at 1, 28-29; *see* HT 1744-45 (Noonan). In summary, Noonan found "hostility between the PTs themselves" on the W55, with "little or no involvement by first-line supervision." CX 4 at 1, 26. He nonetheless concluded that "first line management has failed to control the problem and take necessary disciplinary actions as required," and that "[f]irst line management is unable or unwilling to contain or change the hostile environment" on the W55. CX 4 at 1, 29. Noonan also found that "senior management" had taken action to correct the hostility, but he questioned whether lower and middle level supervisors had implemented the corrective actions directed by senior management. CX 4 at 1, 26-27; HT 1705-06, 1708 (Noonan). Noonan recommended further training for first-line supervisors in the handling of personnel issues, and he noted that such training had begun. CX 4 at 29. Angelo testified that most of the actions Noonan recommended had already been undertaken by October 1996, when the report was finalized. HT 1834-38 (Angelo); *see* HT 1945 (Weinreich); CX 124. Angelo also testified that "100 percent coverage" by first-line supervisors in the W55 bay and cell areas was re-instituted, and that weekly W55 staff meetings with Cole and the first-line supervisors were resumed. HT 1834-35 (Angelo).³¹

In mid-November, Sottile, McQuay, Rodriguez, Olguin and Byrd filed their ERA complaints. ALJX 2-6. A few days later, the regional OSHA office issued DOL's preliminary decision in favor of Williams on his ERA hostile work environment complaint. ALJX 1. Williams testified that, following OSHA's decision, plant guards

informed him that they had been instructed to accompany him while he was on-site, and advised him where to park so that they could protect his vehicle. HT 2004-05, 2007-08 (Williams). The following week, Williams left the plant following the confrontation with Harter. *See* discussion *supra* §IIE1. In the weeks before and immediately thereafter, the other five Complainants were reassigned from the W55. *Id.*

[Page 47]

The foregoing sequence of events, which began in June, indicates that the Respondent, usually through the actions of Weinreich and Angelo, moved quickly to address any recurrent or continuing problems on the W55 that were brought to higher management's attention. Although Noonan's report provided some information regarding hostilities, in general, on the W55, Williams was the only Complainant who communicated with higher management that he had been the target of harassment. Although the others have demonstrated that lower and middle-level supervisors harassed them during the latter months of the W55 program, the record does not establish that higher management knew or, in the exercise of reasonable care, should have known that such incidents were occurring. For example, Sottile had raised his concern about the May altercation with Barton to Cole. Olguin and Rodriguez had raised their concerns about an incident with Moore to Brito and Cole. However, the record contains no suggestion that such concerns reached higher management. *See* RX 97 at M&H000249; HT 138-40, 177-79 (Sottile), 674-77 (Brito), 866-72, 932, 1984-85 (Olguin), 1526-27 (Cole). We find that neither Angelo nor Weinreich was aware, prior to the filing of the other five hostile work environment complaints in mid-November, that W55 PTs other than Williams believed they were the targets of either co-worker or supervisory harassment. *See* HT 1836-39 (Angelo), 1880-81, 1884 (Weinreich).

In September, Noonan found that some PTs believed that the ECP was "a waste of time." CX 4 at 21. Even if the other five Complainants shared this view, Williams' testimony indicates that Weinreich had an established "open-door" policy. HT 297 (Williams). Particularly in view of Weinreich's accessibility to Williams since April, the other Complainants should have recognized that Weinreich would be interested in their concerns. Another important fact is that Weinreich and Angelo had shown their willingness to entertain safety concerns about the W55 disassembly process. At hearing, Sottile contrasted Weinreich's February 29 direction that W55 cell operations be suspended for re-tooling with the negative reaction of W55 supervisors to safety-related concerns. HT 111-12 (Sottile). McQuay's testimony suggests a similar recognition that higher management was likely to be receptive to safety concerns raised by the PTs. McQuay testified that it was "[a] constant battle to get issues past the first and second-line supervisors to someone who would listen." HT 1959-60 (McQuay). The Complainants were doubtlessly aware that neither Angelo nor Weinreich was involved with day-to-day W55 operations. *See* HT 1784-85 (Angelo). Unless the PTs dealt directly with them, Weinreich and Angelo would not know that lower and middle supervisors responded negatively to safety concerns or disregarded safety guidelines.

We therefore conclude that, even if the Complainants believed that filing a complaint with the ECP in the latter months of 1996 was not worthwhile, they could have instead voiced their concerns directly to Weinreich or Angelo. Weinreich's action after he received notice that the other five Complainants had filed ERA complaints in November provides further support for this conclusion. Within days after the filings, Weinreich scheduled meetings with them and George, the union official, to discuss their concerns. HT 1893-94 (Weinreich). However, on November 26, Sottile telephoned Weinreich's office and cancelled the meetings, stating that he and the others preferred not to meet with Weinreich without their attorney present. HT 1894 (Weinreich); RX 91; *see* HT 939 (Olguin).

The record also contains no indication that Williams, who had been present when the others were harassed during the latter months of the program, alerted Angelo or Weinreich about such incidents. Weinreich's attempt to speak with Williams as soon as he learned that Williams had resigned on November 27, as well as the conciliatory letter Weinreich sent to Williams, attest that he was still available to discuss Williams' concerns as they developed. HT 1891-93 (Weinreich); RX 93. The evidence also establishes that, at the time of the hearing, management was continuing to address deficiencies of lower and middle supervisors and to further enhance the effectiveness of its Employee Concerns Program. HT 1820-21 (Angelo), 1910-12 (Weinreich).

Particularly in view of Weinreich's accessibility, as well as the emphasis that Angelo and Weinreich placed on safety, we conclude that the Complainants were not justified in failing to alert higher management to their concerns in the latter months of the W55 program, either through filing an ECP complaint or by directly communicating with Angelo or Weinreich, or both. *Cf. Woods v. Delta Beverage Group, Inc.*, 274 F.3d 295, 300-01 (5th Cir. 2001) (holding in Title VII case that harassed employee did not have objective basis to conclude that it would be futile to notify employer of recurrence of harassment). In the absence of such action on the part of the Complainants, higher management could properly feel confident that the hostile work environment had been corrected.

[Page 48]

c. Conclusion regarding employer liability

For the foregoing reasons, we find that the Respondent did not receive actual notice of the hostile work environment on the W55 until late March 1996, when it received the Meyer report. We also find that the Respondent had an adequate complaint procedure in place when the hostile work environment developed on the W55, and thus the Respondent cannot be held to have received constructive notice prior to receipt of the Meyer report. We further find that the Respondent took prompt, appropriate action to correct the hostile work environment, first when it received the Meyer report, and then when it was provided notice of recurrent hostility in July and September.³² We therefore

conclude that under the negligence standard set forth in *Varnadore* (1996), the Complainants have failed to establish a basis for employer liability.

The evidence mandates the same result assuming, *arguendo*, that the vicarious liability standard established for Title VII complaints by *Ellerth* and *Faragher* was applicable to the supervisory harassment. Initially, we find that the evidence does not establish that any of the personnel actions taken by lower and middle-level supervisors rise to the level of "tangible employment action" as defined in *Ellerth* and *Faragher*, and that the affirmative defense would thus be available to the Respondent. The Supreme Court described a tangible employment action as encompassing "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Ellerth*, 524 U.S. at 761. The Court also stated that a tangible employment action "in most cases inflicts direct economic harm." 524 U.S. at 762. For the reasons already noted regarding the temporary reassignment actions of Williams, Sottile, McQuay and Rodriguez, we conclude that those actions do not qualify as adverse actions under the ERA or as tangible employment actions within the meaning of *Ellerth* and *Faragher*. See nn.16, 27. We draw a similar conclusion regarding Williams' constructive discharge claim and Sottile's non-promotion claim, which we address *infra* at §§III and IV.

As we have discussed, the evidence establishes that the Respondent exercised reasonable care to prevent and, when put on notice, to promptly correct the harassment on the W55. It therefore would have met the first prong of the *Ellerth* and *Faragher* two-prong affirmative defense. See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. We have also concluded that the evidence establishes that the Complainants failed, without reasonable justification, to put the Respondent on notice of recurrent incidents of harassment during the latter months of the W55 program. The Respondent thus would have met the second prong of the affirmative defense.³³ See *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

We thus conclude that, under the negligence standard or the *Ellerth* and *Faragher* vicarious liability standard, the evidence does not establish a basis for employer liability for the hostile work environment that resulted from co-worker and supervisory harassment on the W55 program.³⁴

III. WILLIAMS' CONSTRUCTIVE DISCHARGE CLAIM

Williams argues that he was constructively discharged on November 27, because "harassment and intimidation were used to achieve production despite unsafe practices," and that he "could no longer trust what was happening because of the push for production" on the W55. CIB at 47-48. To prevail on this constructive discharge complaint under the ERA, Williams must establish that working conditions were so intolerable that a reasonable person would feel compelled to resign. *Dobreuenaski v. Associated Universities, Inc.*, ARB No. 97-125, ALJ No. 96-ERA-44, slip op. at 12 (ARB June 18, 1998) and cases there cited; see also *Brown v. Kinney Shoe Corp.*, 237 F.3d 556,

566 (5th Cir. 2001), *cert denied*, 122 S.Ct. 45 (2001)` (arising under Title VII). Establishing a constructive discharge requires proof of a work environment that is more offensive than that required for establishing a HWE claim. *Berkman*, slip op. at 22-23 and cases there cited.

[Page 49]

The ALJ summarily concluded that Williams' working conditions were not so intolerable that a reasonable person would have felt compelled to resign, but he did not provide factual findings to support that conclusion. RD&O at 64-66. The ALJ did, however, discredit Williams' testimony that he left employment because of the working conditions. Instead, he found that Williams' departure was "premeditated," as Williams had planned to leave Pantex within a matter of months. *Id.* at 65-66. Whether or not Williams had determined in advance to terminate his employment at Pantex on November 27, we find that the uncontradicted evidence of record establishes that Williams' working conditions were not intolerable.

We have concluded that a hostile work environment existed on the W55 but, as noted, proof of intolerable working conditions imposes a higher burden. Harter's confrontation of Williams on November 27 because of the delay in returning with the W55 work area keys clearly precipitated Williams' departure. *See* discussion *supra* §IIE1. Harter was angry because DOE representative Ross had stopped Williams and Sottile *en route* to discuss the crushed detonator incident of the previous day. Harter had also become angry the previous day when resisting the PTs' concern about the crushed detonator cable.

On the other hand, the uncontradicted evidence indicates that Williams' working conditions for the weeks preceding November 27 had improved in various ways. As the ALJ stated, Williams had received the favorable OSHA decision on his ERA hostile work environment complaint only a few work days before November 27. RD&O at 65; ALJX 1. Other members of the B Group had joined Williams in alleging that a HWE existed on the W55, by filing ERA complaints a few days before the November 21 decision in Williams' favor was issued. ALJX 2 - 6. The W55 was nearing completion. Other PTs had been reassigned elsewhere but Williams had been retained on the W55, apparently because of the quality of his work. HT 1515 (Harter). Furthermore, the evidence does not indicate an escalation in harassing actions toward Williams in the weeks before he left work on November 27. Rather, the harassing incidents that occurred in October and November concern almost exclusively the other Complainants' exchanges with Harter and Brito, as opposed to harassment directed at Williams. *See* summary *supra* ' IIE. In addition, on November 27 Ross had assured Williams that the concern about the detonator cable was valid and that he was going to pursue the matter. HT 546-48, 551 (Ross).

Finally, even when we limit our analysis of the constructive discharge allegation to the confrontation between Williams and Harter on November 27, we do not find that Williams established intolerable work conditions immediately preceding his resignation.

Despite Harter's angry remarks about Williams' brief discussion with the DOE representative, Williams had alternatives available to remove himself from the harassing situation. *See generally Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1015 (7th Cir. 1997) (except in extraordinary circumstances, Title VII complainant is expected to remain on the job while seeking relief from harassment). Rather than leaving the plant on November 27, Williams could have left the W55 work area and discussed the situation with Weinreich, Angelo, or even George, the chief union official in the plant. As we discussed in analyzing the Respondent's remedial efforts, Weinreich had continued to maintain open channels of communication with Williams since April 1996. *See* discussion *supra* §II G3. Furthermore, Weinreich and Angelo consistently responded to PTs' concerns about W55 operations that were brought to them. *See id.*

Williams could have chosen to seek relief through measures short of resignation. This fact is reinforced by the letter that Weinreich, the plant manager, sent to Williams later on the day he left the plant, and Williams' response to it. In this November 27 letter to Williams, Weinreich stated that he was disappointed to learn of Williams' resignation and asked him to return to work at Pantex. Weinreich also invited Williams to contact him and indicated that he would be happy to meet with Williams at his home. RX 93; HT 346-47 (Williams), 1891-93 (Weinreich). Williams could have withdrawn his resignation when Weinreich gave him the opportunity soon after November 27. Instead, Williams responded by letter dated December 1, stating that he had thought about leaving Pantex for some time before November 27. He also stated that he would return to the plant "if my complaints can be satisfactorily resolved, my attorneys paid, and continued abuse brought to an end," and that the "terms" of his return to the plant should be discussed with his attorney. RX 96.

[Page 50]

For all the foregoing reasons, we conclude that Williams failed to establish that a reasonable person in his situation on November 27 would have felt compelled to resign.

IV. SOTTILE'S NON-SELECTION FOR PROMOTION CLAIM

Sottile challenges the Respondent's failure to select him for a supervisory position for which he applied in May 1996.³⁵ CIB 40-42. The ALJ concluded that Sottile had failed to offer evidence linking his non-selection for the position, operations manager for production activity control in Cole's section, with retaliatory intent, and thus rejected Sottile's contention. RD&O at 68; *see* RD&O at 54, FOF #271. The ALJ found that Cole had filled the position through lateral transfer of a supervisory employee who already held the operations manager position in another division. *Id.*

In support of his retaliatory intent argument, Sottile cites evidence that Cole was familiar with various safety-related concerns that Sottile had raised in the months prior to filling the supervisory vacancy. Sottile also cites the Respondent's failure to offer any evidence to explain Cole's refusal to interview Sottile for the supervisory position. In

addition, Sottile urges that his qualifications were superior to those of the supervisor who was laterally transferred. CIB 41-42. The Respondent urges that Sottile failed to establish that Cole knew of his protected activities. RRB 48. The Respondent also argues that, because the selectee was already holding the operations manager position in another division and was merely transferred into Cole's section, a comparison of the selectee's qualifications with Sottile's is irrelevant. *Id.*

To prevail on this claim, Sottile must establish that he was qualified for the supervisory position, and that he applied for it, and that he was rejected in favor of a similarly qualified selectee. See *Holtzclaw v. Kentucky Natural Resources and Environmental Protection Cabinet*, ARB No. 96-090, ALJ No. 85-CAA-7, slip op. at 7 (ARB Feb. 13, 1997) and cases there cited; *Samodurov v. Gen. Physics Corp.*, No. 89-ERA-20, slip op. at 11 (Sec'y Nov. 16, 1993) (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1972)). The evidence establishes that Cole told Sottile that he would not be interviewed for the position because management had filled the position; Sottile later learned that the position was filled through transfer of a supervisor from another division. HT 121-24 (Sottile); see CX 80, 82; see also RRB at 48 (relying on Sottile's testimony regarding how the position was filled).

Sottile's non-selection claim must fail because the evidence does not establish that he and the individual selected to fill the supervisory slot were "similarly qualified." The record indicates that, as an incumbent supervisor with the Respondent, the selectee had an obvious advantage over Sottile, despite Sottile's years of managerial experience at a high level in the United States Navy. In examining a non-selection claim, it is not our role to re-evaluate the comparable qualifications of the candidates at issue if the evidence establishes a legitimate basis on which management could distinguish between the candidates' qualifications. See generally *Nichols v. Lewis Grocer*, 138 F.3d 563, 567-70 (5th Cir. 1998) (upholding employer's reliance on higher qualifications as evaluated by employer in case arising under Louisiana anti-discrimination statute).

[Page 51]

Inasmuch as Sottile has not proven that he was rejected in favor of a similarly qualified candidate, he has not established an adverse action of failure to promote under the ERA. Based on this conclusion, we need not examine further evidence relevant to his non-selection claim, including evidence of retaliatory intent.

CONCLUSION and ORDER

We conclude that the six Complainants – Williams, McQuay, Sottile, Olguin, Byrd and Rodriguez – established the existence of a hostile work environment on the W55 but failed to establish employer liability for that environment. We also conclude that Williams, McQuay, Sottile and Rodriguez failed to sustain their temporary reassignment claims, that Williams failed to sustain his constructive discharge claim, and that Sottile failed to sustain his non-promotion claim. These complaints are therefore dismissed.

SO ORDERED.

OLIVER M. TRANSUE
Administrative Appeals Judge

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

[ENDNOTES]

¹ The following abbreviations are used in this decision to refer to the evidentiary record and the parties' briefs before the Board: Hearing Transcript, HT; Complainants' Exhibit, CX; Respondent's Exhibit, RX; ALJ Exhibit, ALJX; Complainants' Initial Brief, CIB; Complainants' Rebuttal Brief, CRB; Respondent's Reply Brief, RRB; Complainants' Supplemental Brief, Comp. Supp. Brief; Respondent's Response to Complainants' Supplemental Brief, Resp. Supp. Brief; Complainants' Reply to Respondent's Response to Complainants' Supplemental Brief, Comp. Supp. Reply.

² Pursuant to 29 C.F.R. Part 24 as amended in 1998, the Board has jurisdiction to review currently issued recommended decisions in cases arising under the statutes listed at 29 C.F.R. §24.1(a) only if an appeal is filed with the ARB by an aggrieved party. 29 C.F.R. §24.7(d) (2001); *see* 63 Fed. Reg. 6614 (Feb. 9, 1998).

³ The employee protection provision, which was originally enacted as Section 210 of the ERA as amended in 1978, Pub. L. No. 95-601, §10, 92 Stat. 2949, 2951 (Nov. 6, 1978), was renumbered as Section 211 and amended by Section 2902(h)(3) of the Comprehensive National Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3124 (Oct. 24, 1992). Section 2902(a) amended Section 211 to, *inter alia*, extend coverage to employees working for DOE contractors like the Respondent here. 106 Stat. 3123, codified at 42 U.S.C. §5851(a)(2)(D) (1994).

⁴ For example, McQuay testified that the exercise of his stop-work authority in a W55 safety meeting on February 28 was the first time he had invoked that authority since he came to work at Pantex in 1966. HT 789-91 (McQuay).

⁵ An assembly engineering manager, Ernest McNabb, testified that William Weinreich, the plant manager, considered it "a cardinal sin" for PTs to be forced to continue working on a weapon when they were uncomfortable. HT 1592 (McNabb).

⁶ We note that the record contains other evidence that suggests that Pantex Plant personnel were generally antagonistic to whistleblower activities. We have considered this evidence in our evaluation of these HWE complaints. HT 1430-31 (Pontius, testifying that it is "a point of contention through[out] Pantex" when someone threatens

to shut down a program); HT 326-29 (Williams); CX 4 at 20 (regarding W70 PT Perry's threat to "take care of" Williams "without a trace" if the W70 was shut down because of Williams' whistleblowing).

⁷ The Complainants submitted the documents at issue as an appendix to their brief that was filed with the Board on February 10, 1998. CIB, App. A. On May 8, 1998, the Respondent moved that the documents filed as Appendix A, in addition to Appendix B to the Complainants' brief, which concerns the damages issue, be stricken from the record. On June 12, 1998, the Complainants filed a response to the May 8 motion, in which they opposed the motion and, in the alternative, requested that references to Respondent's Proposed Findings of Fact contained in the Respondent's brief filed on May 11, 1998, be stricken. By Order issued May 23, 2001, the Board reserved ruling on the merits of the Respondent's motion to strike and the related pleadings filed by both parties. 5/23/01 Order at 2. Our rejection of the Complainants' argument regarding the ALJ's exclusion of the documents at Appendix A renders moot the Respondent's motion to strike Appendix A, as well as the responsive motion filed by the Complainants on June 12. Similarly, our dismissal of the complaints in this case renders moot the Respondent's motion to strike the Complainants' Appendix B, concerning damages.

⁸ The United States Supreme Court established a new standard for establishing employer liability for supervisory sexual harassment under Title VII in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries v. Ellerth*, 524 U.S. 742 (1998). See discussion *infra* §IIG1. By order dated May 23, 2001, the Board granted the Complainants' July 9, 1998 motion for leave to file a supplemental brief regarding the *Ellerth* and *Faragher* decisions and accepted the Complainants' supplemental brief that had been filed with the motion. The Board order granted the Respondent's motion to file a response to the supplemental brief. The Respondent's supplemental brief responding to the Complainants' arguments was filed July 6, 2001. The Complainants' reply brief was filed July 23, 2001. Our consideration of the parties' arguments is reflected in our discussion of the employer liability issue, *infra* at §IIG.

⁹ The question before the Supreme Court in *English* concerned whether the ERA pre-empted the claim for intentional infliction of emotional distress that the complainant had filed against her employer under state law. The case before the Court in *English* thus did not include the ERA complaint that was before the Court of Appeals for the Fourth Circuit in its 1988 decision in *English*, which is cited *supra*. In its 1990 decision, the Supreme Court held that the ERA did not preclude the complainant from filing the state claim.

¹⁰ The enforcement policy statement that accompanies the DOE procedural rules for nuclear activities was revised in 1993. 58 Fed. Reg. 43680 (1993)(Final rule, Procedural Rules for DOE nuclear activities, 10 C.F.R. Part 820). Under the revised enforcement policy statement, "chilling effect reprisals against contractor employees" in violation of the employee protection regulations at 10 C.F.R. Part 708 constitute violations of Nuclear Safety Requirements for which a civil penalty can be imposed pursuant to the Price-Anderson Amendments to the Atomic Energy Act, 42 U.S.C. §2210(n)(2). 58 Fed. Reg.

43680, 43681 (1993)(Final rule, Procedural Rules for DOE nuclear activities, 10 C.F.R. Part 820). In 2000, DOE similarly added information collected in whistleblower complaints adjudicated under the ERA by the Department of Labor that demonstrates retaliation against employees for raising nuclear safety-related issues as a basis for determining whether to impose such penalty. 65 Fed. Reg. 15218-19, 15220-21 (2000) (Final rule, procedural rules for DOE nuclear activities; general statement of enforcement policy, 10 C.F.R. Part 820).

¹¹ Specifically, the definition of "employer" under Section 211 of the ERA as amended includes "a contractor or a subcontractor of the Department of Energy that is indemnified by the Department under Section 170 d. of the Atomic Energy Act of 1954 (42 U.S.C. §2210(d))" except for facilities covered by Executive Order No.12344, nuclear propulsion facilities, which are exempted from coverage. 42 U.S.C. §5851(a)(2)(D) (1994). The report of the House Committee on Interior and Insular Affairs indicates Congressional concern that "whistleblower harassment and retaliation remain all too common in parts of the nuclear industry," and an intention that the amended whistleblower provisions would aid in addressing "those remaining pockets of resistance." H.R. Rep. No. 102-474, pt. 8, at 78 (1992), *reprinted in* 1992 U.S.C.C.A.N. 2282, 2296.

¹² 42 U.S.C. §5851(a) (1988); 42 U.S.C. §5851(a)(2)(A) - (C) (1994); *see also Wensil v. U.S. Dep't of Energy*, No. 86-ERA-15 (Sec'y June 22, 1995) (discussing history of Atomic Energy Act of 1954, Pub. L. No. 83-703, 68 Stat. 919 (codified at 42 U.S.C. §§2011-2296 (1982)), which established the Atomic Energy Commission (AEC); the ERA, Pub. L. No. 93-438, 88 Stat 1233 (codified as amended at 42 U.S.C. §§5801-5891 (1982)), which in 1974 established the Energy Research and Development Administration (ERDA) and the Nuclear Regulatory Commission, and transferred the AEC's responsibility for nuclear weapons facilities to the ERDA; and the statute that established the Department of Energy in 1977, Pub. L. No. 95-91, 91 Stat. 565, 577 (codified as amended at 42 U.S.C. §7151 (1982)), and transferred ERDA responsibility for nuclear weapon weapons facilities to that Department; 10 C.F.R. Chap. I (NRC regulations).

¹³ The Price-Anderson Act, enacted in 1957, and its 1966, 1975 and 1988 amendments, form part of the Atomic Energy Act of 1954, as currently codified at 42 U.S.C. §2011, *et seq.* *See McCafferty v. Centerior Energy*, ARB No. 96-144, ALJ No. 96-ERA-6, slip op. at 5-9 (ARB Sept. 24, 1997) and authorities there cited; n.10 *supra*.

¹⁴ Although the *Kesterson* complaint arose in a nuclear weapons plant, the complainant was a security analyst and did not allege that he had raised concerns regarding the handling of nuclear weaponry or radioactive materials, or other concerns directly related to nuclear safety. Rather, the *Kesterson* allegations of protected activity were confined to the complainant's participation in the whistleblower complaint process on behalf of other employees and his refusal to aid his employer in various actions in opposition to such complaints. *Kesterson*, slip op. at 3.

¹⁵ ALARA is the abbreviation for "as low as is reasonably achievable" and represents a concept that is defined by the DOE as "the approach to radiation protection to manage and control exposures (both individual and collective) to the work force and to the general public to as low as is reasonable, taking into account social, technical, economic, practical, and public policy considerations. As used in [Part 835], ALARA is not a dose limit but a process which has the objective of attaining doses as far below the applicable limits of [Part 835] as is reasonably achievable." 10 C.F.R. §835.2(a) (1995).

¹⁶ We agree with the Complainants that Williams' reassignment represented a retaliatory act that contributed to a hostile work environment under the ERA, but we do not agree that the temporary reassignment to the W70 represented a transfer of the type that constitutes an independent basis for an ERA complaint. *See, e.g., Stone & Webster Eng'g Group v. Herman*, 115 F.3d 1568, 1574, 1576 (11th Cir. 1997), *aff'g Harrison v. Stone & Webster Eng'g Group*, No. 93-ERA-44 (Sec'y Aug. 22, 1995); *DeFord v. Sec'y of Labor*, 700 F.2d 281, 283, 287 (6th Cir. 1983); *Thomas v. Ariz. Public Serv.*, No. 89-ERA-19, slip op. at 2, 7-8, 15-16. (Sec'y Sept. 17, 1993). We base our conclusion on these factors: Williams suffered no loss in pay; he continued to work as a PT, although on a different weapons program; and the reassignment was temporary, lasting approximately one month. Furthermore, we are mindful of the extremely hazardous nature of the work being performed on the W55 and the importance of leaving options available for management to separate employees in order to defuse a situation where tensions could escalate to a critical level. One option would be for management to also reassign other employees involved in the confrontation – like Stone here – during an investigation.

¹⁷ Meyer's investigation notes indicate that the trainer Peak had "alerted" W55 supervisors that the Complainants were "upcoming problems." CX 2 at 2 and M&H000171; HT 716 (Meyer). In a meeting with W55 supervisory personnel on February 23, De los Santos witnessed and documented Brito's complaint that Williams could not be satisfied and should be transferred to another program. CX 7; HT 1346-47, 1355 (De los Santos); *see* HT 1783-88, 1831 (Angelo). On March 7, Doty, who was an Assistant Facility Manager, responded to De los Santos' request for information regarding where Williams was working by derisively remarking that Williams had "died . . . of radiation" exposure. CX 7 at M&H000298-299; CX 106 at M&H000286-287 and 000292; HT 1352-53 (De los Santos). Angelo testified that he counseled Doty regarding this incident and directed Dismantlement Director David Rhoten to counsel Brito. HT 1783-88, 1831 (Angelo). De los Santos also testified that Carry responded to Brito in the February 23 meeting by telling him that reassigning Williams was out of the question. HT 1355 (Angelo); *see* HT 1339-41, 1346-47 (De los Santos).

¹⁸ Also, some W55 supervisors were concerned about Williams' use of the official logbooks, kept in the W55 bay and cell, to record what he viewed as safety issues, but the record does not establish what guidelines Williams had arguably violated by making such entries. *See* HT 223-24 (Williams), 1571-74 (Cole); CX 106 at M&H000284-285 (De los Santos' records); RX 43 at M&H000061-63.

¹⁹ One example is when Williams moved Jackovich aside and took her place in a training exercise. This made her angry because she felt that he had treated her in a condescending manner. HT 1313-15 (Jackovich).

²⁰ Although we have considered the effects of second-hand harassment in assessing the level of hostility established by the Complainants, we do not attempt to include all the incidents of second-hand harassment in the summaries that follow.

²¹ The Complainants all allege that they were subjected to a HWE beginning while they were in W55 training – October 1995 through January 1996 – and continuing until they each departed the W55 late in 1996. ALJX 1-6. All dates cited in the following summaries occur in 1996, unless otherwise indicated.

²² RX 14 is a memorandum dated February 21, 1996, although it addresses the remarks made at the February 22 safety meeting. RX 14 at M&H002881. Carry testified that he inadvertently erroneously dated this and other memoranda that he authored which are in evidence. HT 1450-51 (Carry).

²³ Long testified that "safe and repeatable process" was a phrase taken from the "seamless safety" approach to NEOPs development. HT 1394-1400 (Long). He also acknowledged, however, that Pantex had only begun the transition to the "seamless safety" approach at the time the W55 NEOPs were developed and that the W55 program only partially incorporated the "seamless safety" approach. HT 1407 (Long); *see* HT 1902, 1904-05 (Weinreich). Long testified that he did not believe that Herring intended her use of the "safe and repeatable process" phrase to discourage the voicing of concerns about the safety of the process. HT 1398-1400 (Long).

²⁴ Williams was absent on leave connected with knee surgery from July 22 through August 25. RX 1.

²⁵ *See* ALARA definition at n.15, *supra*.

²⁶ Cole tentatively recalled that Sottile was the PT who had raised the issue about the number of units in the work area. HT 1546-51 (Cole). Especially since the record demonstrates that this issue was raised by a number of the Complainants at different times and with different supervisors, we do not consider this tentative identification of the PT who raised the issue to undermine McQuay's testimony that he raised the issue.

²⁷ The timing of McQuay's assignment to work with the Facilities Management division suggests a retaliatory motive and that action clearly added to the hostility that McQuay experienced on the W55 program. As with Williams' temporary reassignment to the W70 program in March, however, we do not agree that McQuay's interim assignment represented a transfer of the type that constitutes an independent basis for an ERA complaint. *See, e.g., Stone & Webster Eng'g Group v. Herman*, 115 F.3d 1568, 1574, 1576 (11th Cir. 1997), *aff'g Harrison v. Stone & Webster Eng'g Group*, No. 93-ERA-44, (Sec'y Aug. 22, 1995); *DeFord v. Sec'y of Labor*, 700 F.2d 281, 283, 287 (6th Cir. 1983);

Thomas v. Ariz. Public Serv., No. 89-ERA-19, slip op. at 2, 7-8, 15-16 (Sec'y Sept. 17, 1993). Uncontradicted evidence establishes that PTs – rather than custodial personnel – were routinely assigned to clean restricted manufacturing areas, owing both to security concerns and the risks posed by hazardous materials in those areas. HT 682-84 (Brito), 975 (Rodriguez), 1332-33 (Moore). Consequently, such assignments fell within the parameters of the PT position. Although McQuay urged that he was assigned to work in non-manufacturing areas under extremely cold conditions, he did not establish the duration of such assignments and whether he objected to the assignment at that time. *See Boudrie v. Commonwealth Edison Co.*, No. 95-ERA-165, slip op. at 9-10 (ARB Apr. 22, 1997); *cf. Carter v. Elec. Dist. No. 2 of Pinal Co.*, No. 92-TSC-11, slip op. at 2, 15, 17 (Sec'y July 26, 1995) (complainant established that transfer from office job of environmental compliance officer to warehouseman, which required him to dig holes outdoors in excessive heat, lasted a number of months). We thus conclude that the evidence does not establish that the custodial assignments in this case were materially distinguishable from the custodial work ordinarily performed by PTs while between weapons programs.

²⁸ Under the ERA as amended in 1992, an employer may avoid liability for an adverse action related to protected activity by establishing with clear and convincing evidence that it would have taken the same adverse action in the absence of protected activity on the part of the complainant. 42 U.S.C. §5851(b)(3)(C), (D). For example, in a case involving a challenged termination from employment, an employer might avoid liability by showing that the termination would have occurred due to a reduction in force, whether the employee engaged in protected activity or not. This dual, or mixed, motive paradigm could also be applied to a hostile work environment complaint, and would provide a means of avoiding liability prior to reaching the traditional negligence and vicarious liability theories that we discuss *infra*. Instead of proving that the complained of personnel action would have been taken in the absence of protected activity, the employer would be required to prove that factors unrelated to protected activity created a level of hostility equal to that which would be actionable under the ERA. We have considered whether each of the Complainants would have experienced an actionable level of hostility had he not engaged in activity protected by the ERA, *i.e.*, whether personality conflicts or other factors unrelated to protected activity would have provoked a level of hostility comparable to the actionable level of hostility in this case. Based on our analysis of the relationship between the Complainants' protected activities and the incidents of harassment that are set forth at §IID3 *supra*, we conclude that the animosity toward the Complainants would not have reached an abusive level in the absence of their protected activities.

²⁹ Nonetheless, as one Court of Appeals observed, "the developing consensus" is that the *Ellerth* and *Faragher* standard applies to other types of harassment under Title VII. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 n. 9 (4th Cir. 2001) and cases there cited; *see also Walker v. Thompson*, 214 F.3d 615, 626-28 (5th Cir. 2000). We also note, however, that the *Ellerth* and *Faragher* standard has been subject to varying interpretations by Federal courts. *See* Jeannine Novak, "Let's Be Reasonable"- Resolving the Ambiguities of the *Faragher-Ellerth* Affirmative Defense, 68 Def. Couns. J. 211

(2001); Daniel N. Raytis, Note, *Indest v. Freeman Decorating, Inc.: Dealing with Vicarious Liability for Sexual Harassment by a Supervisor*, 35 U.S.F.L. Rev. 623 (2001).

³⁰ Primarily because we disagree with the ALJ's conclusion that supervisory harassment did not play a role in the hostile work environment, we cannot concur in his reliance on two actions that W55 supervisors took after operations resumed in May. *See* RD&O at 62. First, the separation of the Complainants from antagonistic A Group PTs could have constituted a reasonable corrective action *if* Pontius and Harter had handled it properly, but they did not. *See* PTcertification discussion *supra* §IIF. The separation was not addressed in any of the Action Plans submitted by the Respondent, and was not cited by Angelo or Weinreich as a corrective action. *See* RX 40, 62, 79, 124. Similarly irrelevant to the corrective actions taken by higher management in April are the weekly meetings held with the PTs by Brito and Cole. *See* RD&O at 62-63; Resp. Supp. Brief at 32. Brito testified that he suggested these meetings to Herring, to provide an opportunity for the PTs to raise concerns about work on the W55 operation. HT 676-77 (Brito). After Carry and Herring left the W55 in late March, Brito held the meetings along with Cole. HT 677-78 (Brito). Our findings that Brito contributed to the hostility toward the Complainants, that other PTs ridiculed those who raised safety concerns in stand-up meetings, and that the supervisors present did not control such ridicule, *see* discussion *supra* § IIE3, detract from consideration of this as a remedial action.

³¹ Angelo explained that W55 PTs had previously asked for less supervisory presence while they were working and had asked that the weekly meetings with middle management be suspended. HT 1834-35 (Angelo). Cole also testified regarding the PTs' request that first-line supervisors not be "always looking over their shoulders"; Cole's records indicate that management had agreed to that request on October 3. HT 1527-31 (Cole); RX 97 at M&H000253.

³² We do not agree with the Respondent that its discipline of Harter for his angry conduct on November 27, 1996 constitutes a corrective action for purposes of the employer liability analysis. RRB16 n.16. Angelo testified that Harter was disciplined – at some unidentified time after November 27 – for his intemperate remarks and conduct on that occasion but Angelo repeatedly denied that Harter's angry remarks about the DOE representative stopping Sottile and Williams constituted harassment. HT 1024-26, 1788-89 (Angelo); *see* HT 1676-77 (Rowe); *see also* discussion *supra* §IIE1. We therefore have not considered that discipline among the corrective actions taken by the Respondent.

³³ We need not reach the alternative ground for establishing the second prong, *i.e.*, that the complainants unreasonably failed to avoid harm otherwise. *See Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

³⁴ Our hostile work environment determination essentially ends with the reassignments of the last of the six Complainants from the W55 in early to mid-December 1996. We have credited the testimony of Sottile and Byrd that Harter, Brito and Pontius were ominously silent or openly rude when they crossed paths with those Complainants shortly after their

reassignments but, like the ALJ, have not considered events related to the Complainants' work assignments since that time. *See* §IIE3, 5 *supra*; *see also* HT 1141-48 (ALJ, ruling that the HWE complaints before him were limited to retaliation for protected activity on the W55 and that evidence related to the Complainants' later program assignments was not relevant).

³⁵ Although Sottile applied for two identical supervisory positions in May, one in Cole's section and one in the section managed by Byron Burkhard, Sottile has challenged only the non-selection for the position under Cole's supervision. HT 121-30, 187-88 (Sottile); *see* HT 645-46 (Burkhard).